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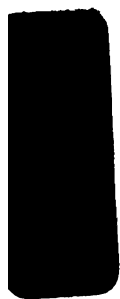
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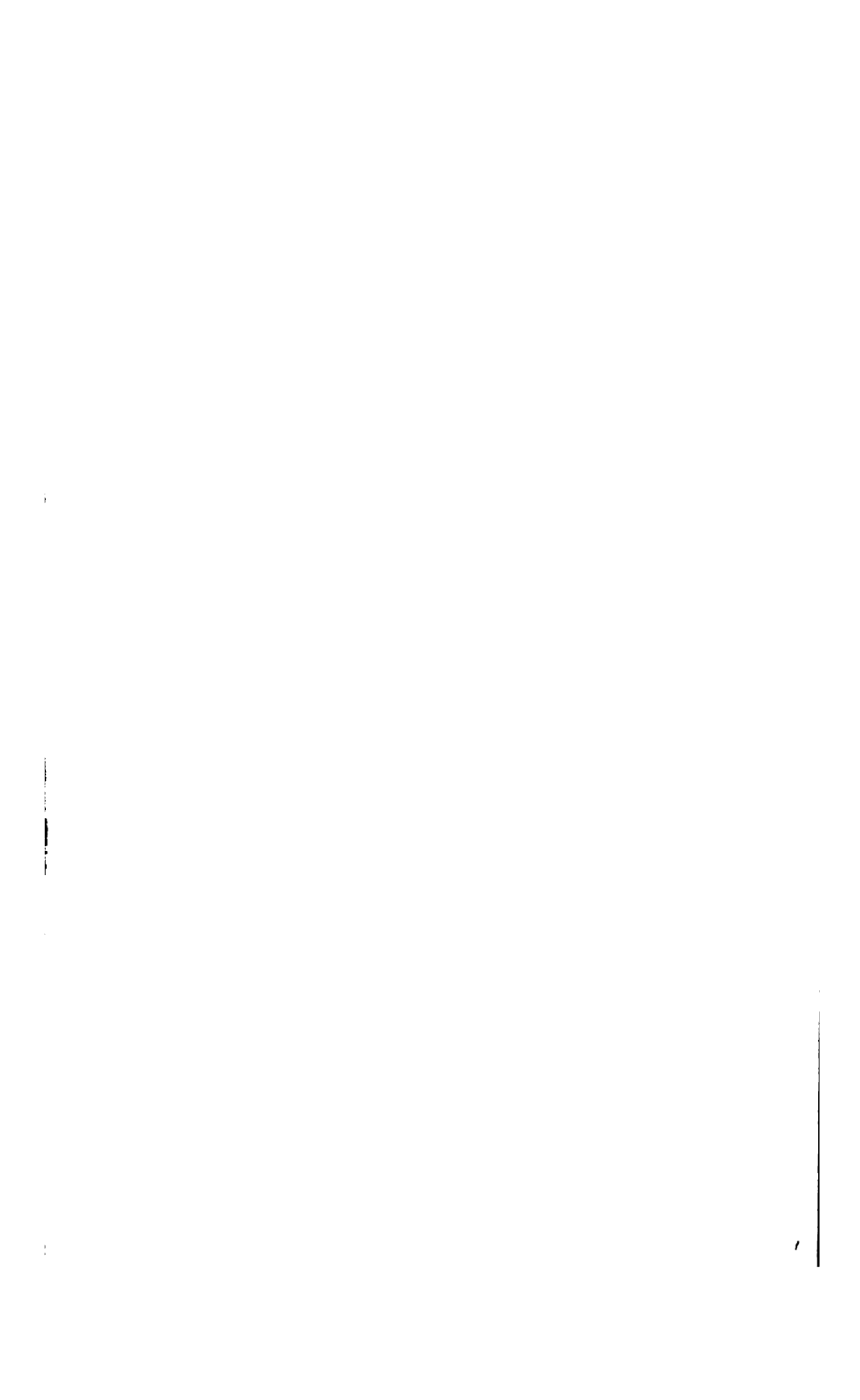
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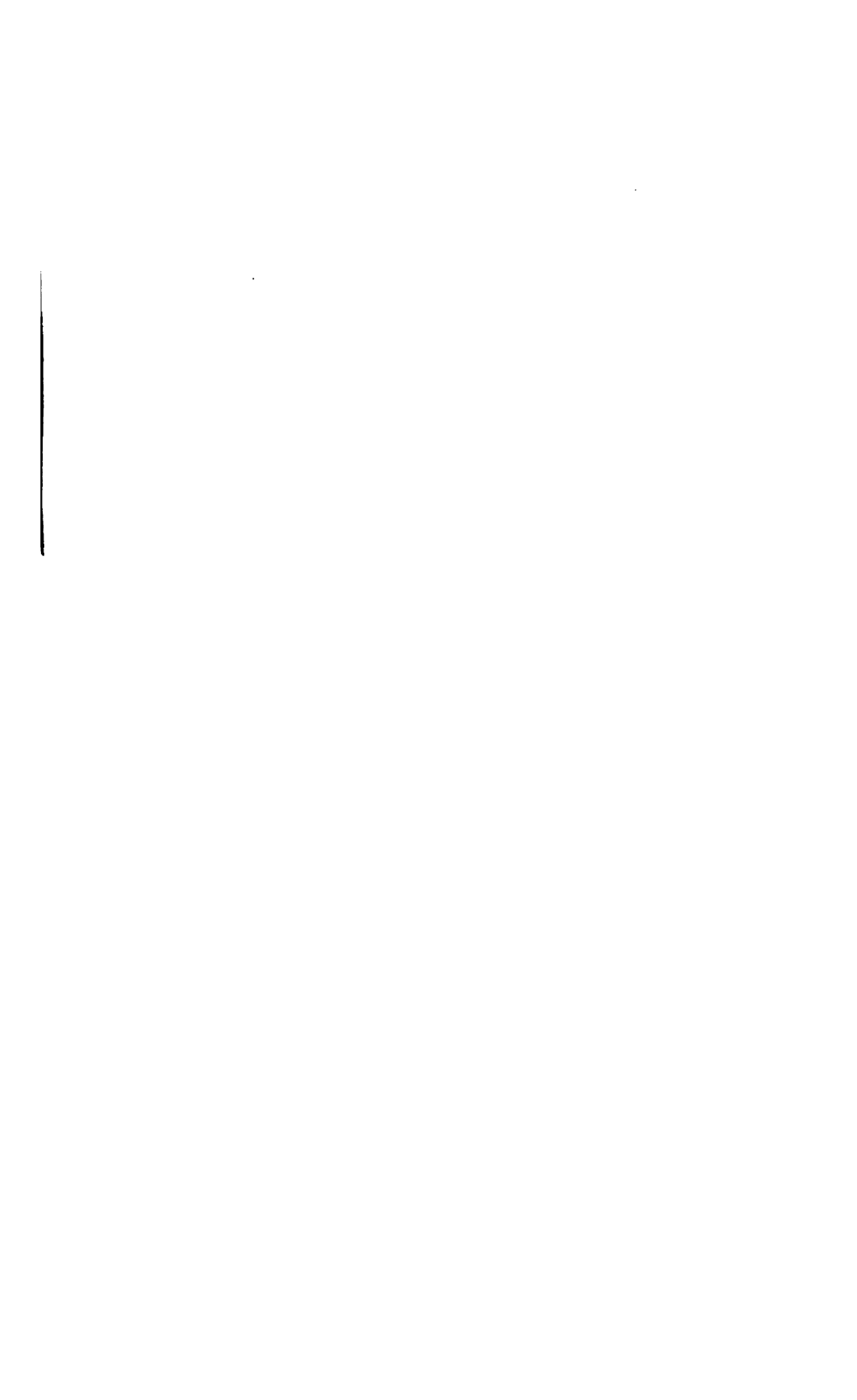
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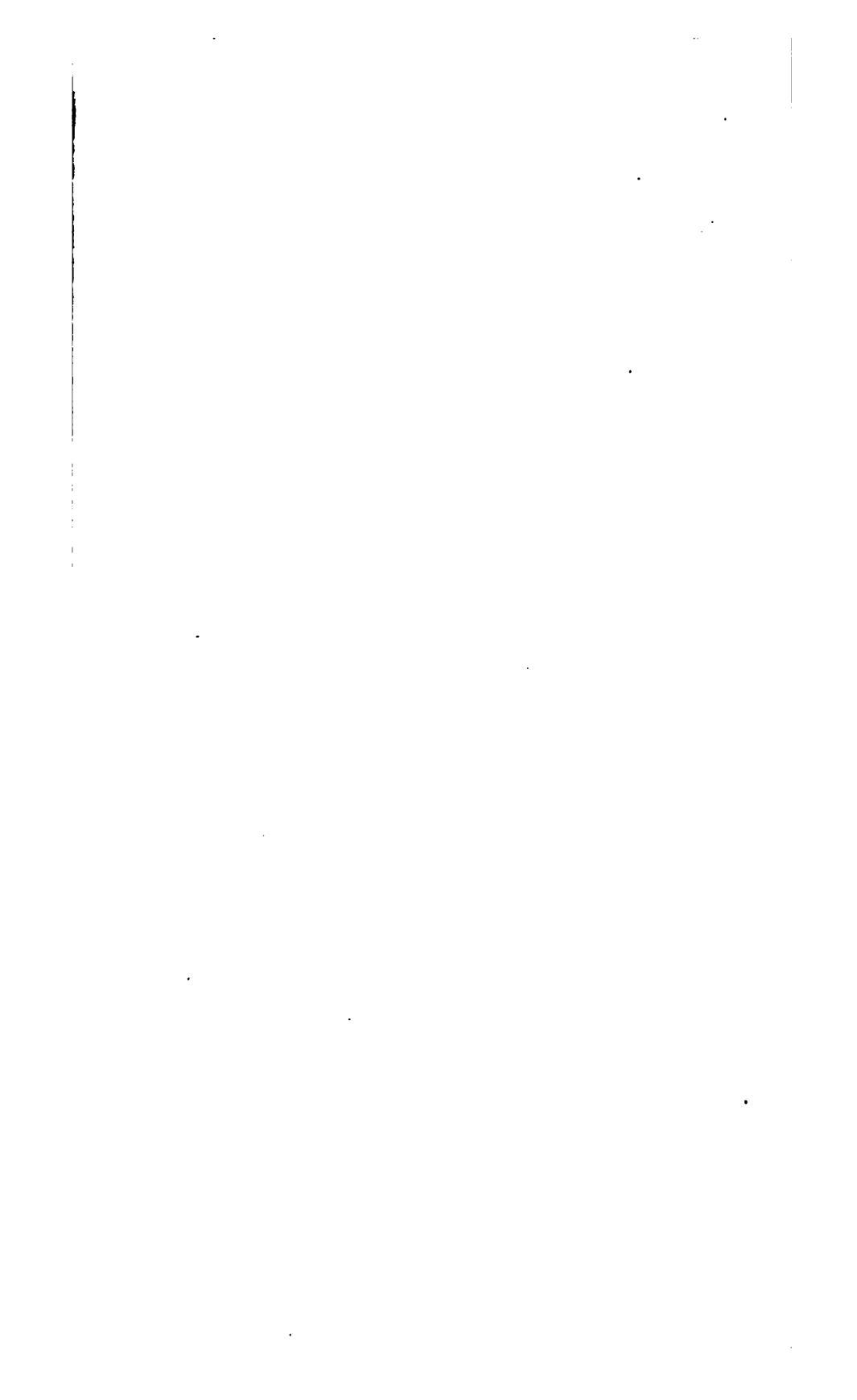












THE  
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OF THE

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WITH

NOTES AND REFERENCES

BY

ISAAC GRANT THOMPSON.

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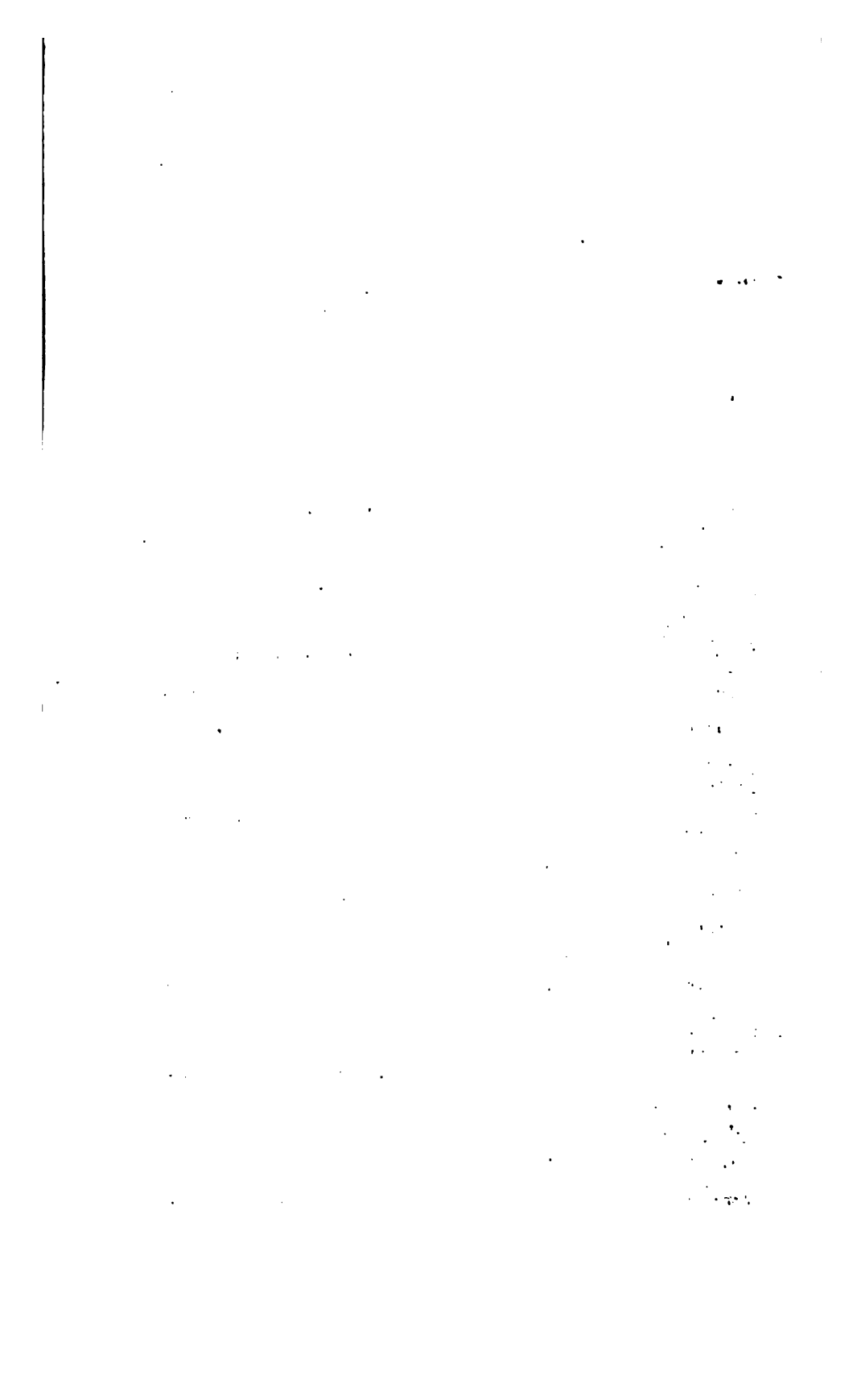


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CASES  
IN  
SUPREME COURT  
OF  
ILLINOIS.

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RICHARD, appellant, v. BENT.

(59 ILL. 38.)

*Covenant against incumbrances — breach of — rights of remote grantees.*

Defendant conveyed land to F. by deed containing a covenant "that the said lands are free from all incumbrances." At the time of the conveyance there were taxes unpaid on the land. F. conveyed the land to plaintiff, who paid the taxes and brought an action on the covenant against defendant. *Held*, that although the covenant was nominally broken on the delivery of the deed by defendant to F., yet as F. did not remove the incumbrance nor suffer any damage therefrom, the right of action for the breach of the covenant passed to and vested in plaintiff. The case is not within the rule prohibiting assignments of choses in action.

ACTION of covenant brought by Silas Bent against August Richard. The declaration alleged that on September 20, 1869, the defendant conveyed certain lands to one Freeman, by deed, containing the covenant in question in the form: "that the said lands are free from all incumbrances," and that defendant would warrant and defend the title and possession of the lands to Freeman, his heirs and assigns. It was also alleged that at the time of this conveyance there were taxes on the land chargeable to defendant; that

Freeman conveyed the land to plaintiff who was compelled to pay the taxes in order to prevent the title from passing out of his hands for non-payment of taxes; that Freeman became insolvent soon after making the conveyance to plaintiff; and that defendant has broken his covenant to the damage of plaintiff of \$500. At the trial plaintiff obtained judgment; and defendant appealed.

*Kass & Wilderman*, for appellant.

*James M. Dill*, for appellee.

SHELDON, J. The question made on the present record is, whether this action lies by a remote grantee against a remote grantor, upon the covenant against incumbrances in the deed of the latter, it being in this form, "that the said lands are free from all incumbrances."

The position taken by the appellant is, that this covenant is in the present tense; that there was a breach of it as soon as the deed was executed by the defendant to Freeman, the covenantee; that a right of action for the breach of the covenant immediately accrued in favor of Freeman; that the right of action was a *chase in action*, and, like all other *choses in action*, could not be so assigned as to enable the assignee to bring an action in his own name; that an assignee cannot sue upon a breach of contract that happened before his time.

And the weight of American authority is undoubtedly in favor of the position, that the covenant against incumbrances, in the form of the one in question, being broken, if at all, at the instant of its creation, is thereby turned into a mere right of action, which is not assignable at law, which can be taken advantage of only by the covenantee or his personal representatives, and can neither pass to an heir, a devisee, nor a subsequent purchaser. And it is the same with the covenants of seizin and a right to convey, they also being covenants *in presenti*, and broken, if at all, when the deed is delivered. But English decisions hold a contrary rule, as well as those of some of the States.

The question, can an executrix sue for a breach of the covenants of seizin, without showing some special damage to have accrued to the testator, came before the court of King's Bench, in 1813, and was decided in the negative.

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BAYLEY, Justice, said that the testator might have sued in his life-time, but having forborne to sue, the covenant real, and the right of suit thereon, devolved, with the estate, upon the heir. *Kingdon v. Nottle*, 1 Maule & Selw. 355.

The case of *King v. Jones*, 5 Taunt. 418, involved the same principle. The grantor covenanted with the grantee and his heirs, to do all lawful and reasonable acts for further assurance, upon request. The request was afterward made by the grantee and refused by the grantor. The grantee died, not having sued for the breach, and not having been evicted. His heir, who was the party evicted, brought a suit for the breach of covenant, and the court sustained it. The covenantee, it was said, paid his purchase-money, relying on the vendor's covenant; he required him to perform it, but gave time, and did not sue him instantaneously for his neglect, but waited for the event. It was wise so to do, until the ultimate damage was sustained, for otherwise he could not have recovered the whole value; the ultimate damage, then, not having been sustained in the time of the ancestor, the action remained to the heir (who represents the ancestor in respect of land, as the executor does in respect of personalty), in preference to the executor. And this judgment was affirmed on writ of error to the King's Bench. *Jones v. King*, 4 Maule & Selw. 188. The covenant being one for further assurance on request, the technical breach of it occurred upon the refusal to execute the further assurance on request, and the case presents the same question as that arising on the covenant of seizin.

The case first cited, *Kingdon v. Nottle*, came up again, when the same plaintiff sued *as devisee* of the covenantee, on the covenant of seizin. It was argued that the covenant was broken as soon as made, and therefore no right of action passed to the devisee. The Chief Justice in that case says: "Here the covenant passes with the land to the devisee, and has been broken in the time of the devisee for so long as the defendant has not a good title, there is a continuing breach, and it is not like the covenant to do an act of solitary performance, which, not being done, the covenant is broken once for all, but is in the nature of a covenant to do a thing *toties quoties*, as the exigency of the case may require. Here, according to the letter, there was a breach in the testator's life-time; but, according to the spirit, the substantial breach is in the time of the devisee, for she has thereby lost the fruit of the

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covenant in not being able to dispose of the estate." *Kingdon v. Nettle*, 4 Mawle & Selw. 53.

With regard to such breaches of real covenants as occurred in the life-time of the ancestor, but occasioned him no actual damage, or, after his death, the action should be brought in the name of his heir, or his devisee. 1 Chit. Pl. 24, and see Fitzherbert's N. B. 341-6; 3 Wentw. Pl. 445; Rawle's Cov. for Title (3d ed.), 337, *et seq.* and 352, note 1.

The States of Indiana, Ohio, South Carolina and Missouri appear to have adopted the same doctrine as the English courts. *Martin v. Baker*, 5 Blackf. 232; *Backus v. McCoy*, 3 Ohio, 311; *Foots v. Bennett*, 10 id. 312; *Devore v. Sunderland*, 17 id. 52; *McGrady v. Brisbane*, 1 Nott & McC. 104; *Diakson v. Desire*, 23 Mo. 152; *Chambers v. Smith*, id. 179.

In one of the earlier cases in Massachusetts (*Stetson v. Sumner*, 9 Mass. 143), the assignee of one who had received a covenant against incumbrances, was allowed to recover upon it without question as to his right. In another case, in the same court, in pronouncing upon such a covenant, Mr. Justice WILDE, who delivered the opinion, after acknowledging the rule of the common law, that *choses in action* are not assignable, and that it must be held binding, held the following language: "But we are not disposed to apply it (the rule) to cases not coming within the reason of the rule; and we are inclined to the opinion that the present is a case of that description. There was a breach of the covenant, it is true, before the assignment, but for this breach Hitchings (the covenantee) could only have recovered nominal damages. The actual damages accrued after the assignment. They were sustained by the plaintiff and not by Hitchings. \* \* \* It seems to me that, if the present case required a decision upon this point, we might be well warranted in saying that the covenant against incumbrances, notwithstanding the breach, passed to the assignee, so as to entitle him to an action for any damages he might sustain after the assignment, because the breach continued, and the ground of damages has been materially enlarged since that time, so that the plaintiff's title does not depend upon the assignment of a mere *chose in action*." *Sprague v. Baker*, 17 Mass. 536. But afterward, the technical rule denying the action to an assignee was adhered to, and may be considered as the settled one in that State.

Chancellor KENT, in referring, in his Commentaries, to the prin-



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iple as settled by the American cases, remarks that it is to be regretted that the technical scruple that a *chose in action* was not assignable, does necessarily prevent the assignee from availing himself of any or all the covenants. He is the most interested, and the most fit person to claim the indemnity secured by them, for the compensation belongs to him, as the last purchaser and the first sufferer. 4 Comm. 557.

No English decisions in regard to the particular covenant against incumbrances are cited, as in England that covenant, unlike ours, is prospective in its operation, being usually connected with the covenant for quiet enjoyment, as, that the purchaser "*shall* enjoy, etc., and *that* free of all incumbrances," etc. But the rule which allows the action in the name of the assignee of the covenant of seizin, applies with much greater force in the case of the assignment of the covenant against incumbrances.

Where the covenant of seizin is broken, and there is an entire failure of title; the breach is final and complete, the covenant is broken once for all, actual damage and all the damages that can result from the breach have accrued; the measure of damages is the purchase-money and interest; which are at once recoverable. In such case, the right of action is substantial, and its transfer may well be held to come within the rule prohibiting the assignment of *chores in action*.

But as the covenant against incumbrances is one of indemnity, the covenantee can recover only nominal damages for a breach thereof, unless he can show that he has sustained actual loss or injury thereby, or has had to pay money to remove the incumbrance. And where there is the barren right of recovery of only nominal damages, the right of action is one only in name, and is essentially no right of action. It is distinguishable from an ordinary *chose in action*.

The appellee does not claim to make his title to sue, by means of the purchase of a *chose in action*. The subject of his purchase was a lot of ground; the covenant is claimed to be annexed to the real estate; that it ran with the land and passed to him, not by direct operation of assignment, but as an incident to the land. The right of suit for nominal damages, which Freeman had against the appellant, was no matter of consideration between the parties at the time of the purchase, but it was regarded that, in case the purchaser of the land should sustain any actual damage by reason of

a prior incumbrance, the covenant would then be to him a means of indemnity.

It would seem to be a case not coming within the reason of the rule prohibiting the assignment of *choses in action*, as the court were inclined to think in *Sprague v. Baker*, *supra*. What is the temptation to buy up mere nominal rights of action, or the danger therefrom, "lest there should be multiplying contentions and suits."

Mr. Rawle, in his work on Covenants for Title, observes that it is somewhat remarkable that the cases of *Lucy v. Levington*, 2 Lev. 26, and *Lewis v. Ridge*, Cro. Eliz. 863, which have been referred to by American courts in support of the rule, that the covenants of seizin, and against incumbrances, are not assignable, do not at all appear to support the position for which their authority is relied upon. Rawle on Cov. 348. And they seem to decide no more than that *after total breach* the covenant becomes a *chose in action*, and incapable of transmission or descent. And a distinction between the former cases of *Lucy v. Levington*, and *Lewis v. Ridge*, and the later ones of *Kingdon v. Nottle* and *King v. Jones*, appears to be, that, in the former, it was held that covenants, after a substantial breach, would not run with the land; in the latter, that, after a mere nominal breach, they might. As the doctrine of covenants running with land is an exception to the common-law rule that *choses in action* are not assignable, why limit its sphere of usefulness, and confine it to those covenants which may be broken in the future? May it not as well extend to such as have only been nominally broken at the time of assignment, and the substantial breach occurs afterward, and the whole actual damages are sustained by the assignee?

It does not appear to be a sufficient answer, that the rule denying the action to the assignee creates only a formal difficulty, as the assignee may maintain an action in the name of the assignor for his use.

That is a cumbrous form of remedy, and the remedy is liable to be embarrassed. In the case in hand, such rule would require this suit, as we understand, to be brought in the name of the assignee in bankruptcy of Freeman, and to establish the right of action in such assignee, might be a serious inconvenience.

If it be held that the real cause of action on such a covenant accrues immediately upon the making of the deed, it would see...

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that the statute of limitations would then commence to run, when the breach was only formal, and no actual damage suffered or recoverable, and when, perhaps, the incumbrance was not even discovered; and afterward, when the incumbrance comes to be discovered, or when the actual loss on account of the incumbrance arises, and the substantial breach takes place, the statute of limitations may have run against the action.

In the state of the authorities, not feeling embarrassed by any former decisions of our own upon the point, we feel free to adopt the rule which we regard as the more reasonable and just. That is obviously the one which sustains this action in the present form, for the breach of the covenant against incumbrances, and admittedly so by courts which have felt constrained to lay down the contrary rule, only in supposed obedience to the strict technical common-law rule.

We hardly feel called upon to be more rigid in adherence to a merely technical rule of the English common law, than the English courts themselves.

Although, then, according to the letter, this covenant against incumbrances was broken immediately on the delivery of the deed from the appellant to Freeman, yet, as the latter never removed the incumbrance, nor suffered any damage therefrom, we hold that the right of action for the breach of the covenant passed to and vested in his grantee, the appellee, who sustained the whole actual damage, by paying the taxes and removing the incumbrance.

The judgment of the circuit court is affirmed.

*Judgment affirmed.*

**MUTUAL BENEFIT LIFE INSURANCE COMPANY, appellant, v.  
ROBERTSON.**

(39 Ill. 123.)

*Life insurance — renewal. Waiver.*

A policy was issued on the life of a husband for the benefit of his wife, and a renewal was procured from year to year by payment of an annual premium. The last renewal was obtained during the absence of the husband, the wife telling the agent of the company in response to inquiries about her husband that she had received a letter from him, and that he was in his usual health. *Held*, that this statement being verbal and not referred to in the policy, was a mere representation, and the evidence in the case showing that the statement was not material and did not induce the risk, the renewal was valid. The receipt of an over-due premium by the agent of a life insurance company, and the acceptance thereof by the company when forwarded to them, is a waiver of the condition of forfeiture for non-payment of a premium when due.

ACTION on a life-insurance policy by Mary P. Robertson, against the Mutual Benefit Life Insurance Company. The opinion states the case.

*Snyder & Dill*, for appellant.

*Wm. H. Underwood*, for appellee.

THORNTON, J. This is an action of assumpsit, upon an insurance policy. The declaration contains two special, and the common counts. The general issue was filed, and also special pleas as follows: First, that the policy was originally procured by fraud and misrepresentation; second, that it became void on the 19th day of March, 1869, in consequence of the non-payment of the premium, and its renewal was effected by fraud and misrepresentation. The life of the deceased was insured in 1866, for the benefit of his wife, the appellee, and a renewal was procured from year to year. Appellee recovered a judgment for the amount of the policy and interest.

The assured died in January, 1870. There was introduced, in evidence, a receipt for the annual premium, of date March

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Mutual Benefit Life Insurance Co. v. Robertson.

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19, 1869, signed by the proper officers, which, by its terms, continued the policy in force for one year from its date. The language of this receipt is, "Policy on the life of Byrd M. Robertson is hereby continued in force for one year from date, settlement of the premium having been made." The policy was issued to insure the life of the deceased for the term of life, in consideration of the premium paid, and to be paid in each year during its continuance. This receipt did not make a new contract; it was merely evidence of compliance with the condition of the policy. It did not alter its terms or legal effect, or change the parties; it was not an independent contract, but a continuance of the old one.

A *prima facie* case was made in behalf of appellee, by the introduction of the policy, the renewal receipt, and proof of the death.

It is contended that the continuance of the policy was procured by fraud. This is the allegation of the plea, but it is wholly unsustained by the proof. The premium was due in March, but it was not all paid until in November, and the receipt was actually given in November, and ante-dated. The agent had occasionally advanced it—had assured appellee that it need not be paid on the exact day named in the policy; had induced her to believe that it had been advanced, and had received a part of it in July. He testified that he made inquiry of her as to where, and how, her husband was, in November. She replied, that he was in the State of Missouri; she had just received a letter from him, and that he was in his usual health.

Dr. Perryman, the medical examiner of the company, testified, that in a conversation with appellee, in November, she said she had received a letter from her husband, stating that he was well.

The policy, introduced in evidence, stated that it was made in consideration of the representations contained in the application, and of the premium, and "that if the declaration made by or for the assured, and bearing date March 19, 1866, and upon the faith of which this agreement is made, shall be found in any respect untrue, then this policy shall be void;" and that upon failure to pay the annual premium on the days mentioned, the policy should cease and determine.

Conceding that the representations contained in the application for the policy, were made warranties by the reference to them in the policy, still we cannot say that they were untrue. The application was not introduced, and we are not advised by the evidence, of its

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contents. We cannot determine that there was either misrepresentation or concealment of facts. For aught that appears in this record, there may have been a full disclosure of every fact material to the risk, and a true answer to every question propounded.

Appellee was not bound to set out the application and prove its truth. This paper must have been in the custody of appellant. The company might have introduced it, and proved its representations to be false. We cannot surmise that it contained a warranty of good health, in the absence of proof. *New England Fire and Marine Insurance Co. v. Wetmore*, 32 Ill. 221.

There was, then, no warranty of good health. A warranty is in the nature of a condition precedent; it must appear on the face of the policy; or, if on another part of it, or on a paper physically attached, it must appear that the statements were intended to form a part of the policy; or, if on another paper, they must be so referred to in the policy as clearly to indicate that the parties intended them to form a part of it. A warranty cannot be created nor extended by construction. *Reynolds' Life Insurance*, 85 *et seq.*; *Campbell v. New England Insurance Co.*, 98 Mass. 381; *Burritt v. Saratoga Insurance Co.*, 5 Hill, 188; *Jefferson Insurance Co. v. Cotheal*, 7 Wend. 72.

The only proof to sustain the charge of fraud and misrepresentation was the remark of appellee to the agents of the company, that she had received a letter from the deceased; that he was in Missouri, and in his usual health. The deceased was a traveling agent, and the fact of his absence from home was known to the agents of the company.

This statement was verbal, and is not referred to in the policy, and must be deemed to have been a mere representation. It was independent of the contract, and collateral to it. It may have been untrue, and yet not avoided the policy. It must be proved to have been material, and that it induced the risk. *Farmers' Ins. Co. v. Snyder*, 16 Wend. 481.

Did it induce the risk? The evidence satisfies us to the contrary.

The renewal receipt, though dated the 19th of March, was, in fact, executed on the 11th of November. The premium should have been paid on the 19th of March. Notwithstanding this provision in the policy, a part of the premium was received by the agent of the company, in July; and he had induced appellee

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to believe that it had been advanced. An advancement of it had previously been made by the agent.

The medical examiner of the company, on the 2d day of November, gave a certificate that the assured was then in good health. He had made a careful and personal examination of him, in March, and in September or November, 1869. Besides, appellee testified that she made no application for, and did not know of the necessity of, such a certificate. We think these acts of the agents were the result of their own knowledge, and were not prompted by the representation of appellee.

Their acts were voluntary; the premium was received by the agent, and forwarded to, and accepted by, the company. The agents acted within the scope of their authority; the company ratified these acts. The right of forfeiture was thus waived, and we cannot encourage the perpetration of a fraud by permitting the company to repudiate the conduct of its agents. The condition of forfeiture, in case the annual premium is not paid on the day named, is for its benefit solely, and a waiver of a strict compliance continues the obligation. *F. & M. Insurance Co. v. Chestnut*, 50 Ill. 111; *Ætna Insurance Co. v. Maguire*, 51 id. 342; *Miller v. Phoenix*, 27 Iowa, 203; *Banton v. American Life Insurance Co.*, 25 Conn. 542; *Wing v. Harvey*, 27 Law and Eq. 140.

But the evidence wholly fails to stamp the statement of appellee as a misrepresentation. There is no proof whatever, that she had any knowledge of the alleged sickness of her husband; she communicated all that she knew; she acted in perfect good faith. The failure to communicate a material fact, unknown to the assured, will not vitiate a policy. The undertaking is merely to represent, truly, facts within the knowledge of the assured.

In *Daniels v. Hudson River Fire Insurance Co.*, 12 Cush. 417, Chief Justice SHAW said: "Misrepresentation is the statement of something as fact, which is untrue in fact, and which the assured states, knowing it to be not true, with an intent to deceive the underwriter; or, which he states positively as true, without knowing it to be true, and which has a tendency to mislead — such fact, in either case, being material to the risk."

In the case at bar, there is entire absence of any intent at deception. The representation was not of a positive character, but simply the communication of the contents of a letter. It was not the assertion of a fact, in reply to information sought, and could

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not have misled the agent. The representation did not induce the risk, and under the circumstances, was immaterial, and cannot vitiate the policy. *Carter v. Boehm*, 3 Burr. 1905; *Biays v. The Union Insurance Co.*, 1 Wash. (C. R.) 406; *Lord v. Dall*, 12 Mass. 115; *Swete v. Fairlie*, 6 Carr. & Payne, 1; *Huguenin v. Bailey*, 6 Taunt. 186.

All the evidence, then, as to the last sickness of the deceased, and the cause of his death, was wholly irrelevant, and the errors assigned thereupon are immaterial. The admission, as well as the exclusion of testimony, in regard to such matter, was error without prejudice. Such action of the court could not change the law of the case, or affect the propriety of the verdict.

Counsel for appellant have indulged in language, in their printed argument, highly improper and indecorous to the judge on the circuit. Abuse can never rise to the dignity of argument. If such language had been used in an oral argument, counsel would have been peremptorily silenced.

For like offense in the future, the brief will be ordered to be stricken from the files, and such other action taken as will protect judges of the Circuit Court from like aspersions.

The laws must be respected; they constitute the basis of civil society. For the maintenance of this respect, a gentlemanly courtesy should ever be observed toward those who, for the time, administer them.

The judgment is right, and must be affirmed.

*Judgment affirmed.*



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FENT v. Toledo, Peoria and Warsaw Railway Co.

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**FENT, appellant, v. TOLEDO, PEORIA & WARSAW RAILWAY CO.**

(22 ILL. 220.)

*Fire communicated by locomotives — proximate and remote cause.*

Through the negligence of defendant, a railroad company, sparks from a locomotive set fire to a warehouse. The wind was high, and the building of plaintiff's, two hundred feet from the warehouse, took fire therefrom, and was consumed. In an action to recover for the loss of plaintiff's building, *held*, that the question of proximate or remote cause was for the jury, to be determined under the instruction that the railroad company is to be held responsible, if the loss is a natural consequence of its alleged carelessness, which might have been foreseen by any reasonable person, but it is not to be held responsible for injuries which could not have been foreseen or expected as the results of its negligence or misconduct.

ACTION by Gibberd Fent and others, against The Toledo, Peoria and Warsaw Railway Company, to recover damages for the burning of plaintiff's building, caused by defendant's alleged negligence. The opinion states the case.

*Straights, Young, Harding & Payson, for appellants.*

*Ingersoll & McCune, for appellee.*

LAWRENCE, C. J. On the 1st of October, 1867, a locomotive, with a train of freight cars, belonging to the appellee, in passing eastwardly through the village of Fairbury, threw out great quantities of unusually large cinders, and set on fire two buildings and a lumber yard. The weather at the time was very dry, and the wind blowing freely from the south. One of the buildings ignited by the sparks was a warehouse near the track. The heat and flames from this structure speedily set on fire the building of plaintiffs, situated about two hundred feet from the warehouse, and destroyed it and most of its contents. To recover damages for this loss the plaintiffs have brought this suit.

The defendant in the Circuit Court demurred to the plaintiffs' evidence, and the court sustained the demurrer. To reverse this judgment the plaintiffs bring up the record.

The evidence shows great negligence on the part of defendant,

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out it is unnecessary to discuss this question. Where a demurrer is interposed to the evidence, the rule is, that the demurrer admits not only all that the plaintiffs' testimony has proved, but all that it tends to prove. In this case, therefore, the defendant's negligence must be regarded as admitted. It is not, indeed, controverted, but the counsel rely for defense solely upon the ground that the plaintiffs' building was not set on fire directly by sparks from the defendant's locomotive, but by the burning of the intermediate warehouse, and that therefore the defendant is to be held harmless, under the maxim "*causa proxima, non remota, spectatur*."

There are not many of the maxims of the law which touch so closely upon metaphysical speculation. The rule itself is one of universal application, but the difficulty lies in establishing a criterion by which to determine when the cause of an injury is to be considered proximate, and when merely remote. Greenleaf, in the 2d volume of his Evidence, § 256, lays down the rule that "the damage to be recovered must always be the *natural and proximate consequence* of the act complained of." But this seems little more than the substitution of one form of general expression for another.

Parsons, in his work on Contracts, vol. 2, page 456, 1st ed., after alluding to the confusion in which the adjudged cases leave this question, says: "We have been disposed to think that there is a principle derivable on the one hand from the general reason and justice of the question, and on the other applicable as a test in many cases, and perhaps useful, if not decisive, in all. It is, that every defendant shall be held liable for all of those consequences which might have been foreseen and expected as the results of his conduct, but not for those which he could not have foreseen, and was therefore under no moral obligation to take into consideration." We are disposed to regard this explanation of the rule as clearer, and capable of more precise application, than any other we have met with in our examination of this subject, and it is in substantial accord with what is said by POLLOCK, C. B., in *Higby v. Hewitt*, 5 Exch. 240.

The counsel upon both sides have furnished us with a very elaborate review of the decided cases. We have not the time, and it would be an unnecessary labor, to go over them in detail.

With the exception of two recent cases decided in this country upon the precise question before us, it cannot be denied that the great current of English and American authorities would bring the

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defendant in this case within the category of proximate causes. The great effort of the counsel for defendant has been to explain away, as far as possible, the effect of these authorities, and to draw a distinction between them and the case at bar. However successful they may have been in showing a difference between some of the cases cited by appellants' counsel and that under consideration, on the other hand, they cite no English case, and but two American cases, in which a wrong-doer has been excused from liability under circumstances analogous to those disclosed by this record, on the ground that he was a remote, and not a proximate, cause of the injury done.

From the oft-quoted squip case of *Scott v. Shephard*, 2 W. Black. 892, down to our own day, the English reports abound with instances in which causes more remote than the cause in this case have been held sufficiently direct and proximate to be made a ground of damages. As illustrative of this, we content ourselves with citing *Illidge v. Goodwin*, 24 E. C. L. 272; *Lynch v. Mudin*, 41 id. 422; *Ridgely v. Hewitt*, *ubi supra*; *Greenland v. Chaplin*, 5 Exch. 243, and *Montoyer v. London Insurance Co.*, 6 id. 451. In this last case, the defendant had insured the plaintiff's tobacco against perils of the sea. Hides were shipped in the same vessel. The vessel shipped sea water, which, coming in contact with the hides, caused them to ferment. The fermentation created a noxious vapor which acted on the tobacco and spoiled its flavor. Suit was brought against the company, and the defense was the same relied upon in this case. The court held the defendant responsible, and said in its opinion: "The sea water having caused the hides to ferment, and thereby the tobacco to be spoiled, it is merely playing with terms to say the injury is not occasioned by the sea water. The action of the sea water, which had been shipped in consequence of bad weather, occasioned the fermentation, and is the proximate cause."

If we turn to the American courts, we shall find the general current of authorities to be in harmony with the English precedents. A late case, and one in which a cause much more remote than the fire from the locomotive in the case before us, was held the proximate cause, is *Tweed v. Insurance Co.*, 7 Wall. 44. It was an action brought against an insurance company to recover for cotton stored in a warehouse, and insured against fire, except loss by fire caused by explosion, invasion, etc. An explosion occurred in another warehouse, from which explosion fire was communicated to

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the Eagle Mills, situated on the opposite diagonal corner, and from thence to the warehouse in which the cotton was stored. In the Circuit Court a judgment was obtained against the company, on the ground that the immediate cause of the loss was the fire from the Eagle Mills, and the case was not, therefore, within the exception of the policy. This would seem not an unreasonable view, but the Supreme Court of the United States reversed the judgment, and in delivering their opinion, use the following language: "One of the most valuable of the *criteria* furnished us by the authorities, is to ascertain whether any new cause has intervened between the fact accomplished and the alleged cause. If a new force or power has intervened, of itself sufficient to stand as the cause of the mischief, the other must be considered too remote. In the present case we think there is no such new cause. The explosion undoubtedly produced or set in operation the fire which burned the plaintiff's cotton. The fact that it was carried to the cotton by first burning another mill, supplies no new force or power which caused the burning."

That case was far stronger for the plaintiff than the one at bar is for the defendant.

*Powell v. Deveney*, 3 Cush. 300, and *Vandenburg v. Traux*, 4 Den. 464, are cases in which the court went back further for the proximate and responsible cause than we are asked by the plaintiff to go in the present instance.

The case of *Hart v. Western Railroad Co.*, 13 Metc. 99, presented precisely the same question with that before us. The locomotive set fire to a shop, and the fire crossed the street and destroyed a dwelling-house. The court held the company liable.

In *Perley v. Eastern Railway Co.*, 98 Mass. 414, a similar judgment was pronounced upon a similar state of facts.

Counsel for appellee seek to weaken the authority of these cases by adverting to the fact that they were decided under a statute of Massachusetts, making railway companies liable for all losses by fire communicated from their locomotives, and authorizing them to insure against such risks. But the statute does not in the least degree affect the common-law principle under consideration, and was not so regarded by the court in these decisions. It simply makes the companies liable for fires caused by them, irrespective of the question of negligence. But if the locomotive was the remote, instead of the proximate cause, in the sense of the maxim we are

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now discussing, there would have been no liability under the statute any more than at common law. Upon this question of cause, the cases are as much in point as if there had been no statute. The court, in the last case, in discussing this very objection, that the cause was not proximate, say: "The fact, therefore, that the fire passes through the air, driven by a high wind, and that it is communicated to the plaintiff's property from other intermediate property of other men, does not make his loss a remote consequence of the escape of the fire from the engine." And in another part of the opinion we find the following language: "If, when the cinder escapes through the air, the effect which it produces upon the first combustible substance against which it strikes, is proximate, the effect must continue to be proximate as to every thing which the fire consumes in its direct course. This is so, whether we regard the fire as a combination of the burning substance with the oxygen of the air, or look merely at its visible action and effect. As matter of fact, the injury to the plaintiff was as immediate and direct as an injury would have been which was caused by a bullet fired from the train passing over the intermediate lots, and wounding the plaintiff as he stood upon his own lot. It is as much so as pain and disability are proximate effects of an injury, though they occur at intervals through successive years after the injury was received. Yet these are called proximate effects, though the actual effects of the injury may be greatly modified, in every case, by bodily constitution, habits of life, and accidental circumstances."

In *Cleveland v. Grand Trunk Railway Co.*, 42 Vt. 449, a like rule was applied, without discussion, to similar fires occasioned by locomotives.

The same rule has also been enforced in two recent English cases. *Piggott v. The Eastern Counties Railroad Co.*, 54 E. O. L. 229, and *Smith v. The London & S. W. Railroad Co.*, Law Rep. 5 Com. Pleas, 98. In the first case, the fire was communicated from the first building destroyed to several other frame buildings belonging to the plaintiff. He was allowed to recover, and the counsel for the company obtained a rule *nisi* for a new trial. The rule was subsequently argued before the Common Pleas, and discharged, all the judges concurring. The precise point under consideration was not ruled by the court, and we cite the case because the question of proximate cause seems never to have

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occurred to the counsel or court, all of whom bore names familiar to the profession. It was not suggested that a recovery could not be had for all the buildings as well as for that immediately set on fire by the locomotive.

In the last case, the servants of the railway company had cut the grass, trimmed a hedge bordering the railway, placed the trimmings and grass in heaps near the line, and allowed them to remain there fourteen days during very hot weather, in the month of August. Fire from a passing engine ignited one of these heaps, burned the hedge, and was thence carried by a high wind across a stubble field and a public road and burned the plaintiff's cottage, situate two hundred yards from the railway. There was no evidence of negligence in the construction or management of the engines, the negligence alleged consisting in leaving the hedge trimmings in dry weather near the railway line, where they would be liable to be ignited. There was a verdict for the plaintiff, and leave given to the defendants to move for a nonsuit. On the argument of the motion before the Common Pleas, it was contended, in support of the rule, that the defendants' servants cut the grass and trimmed the hedge in the ordinary course of their duty, and but for the great heat of the weather, and the high wind prevailing at the time of the fire, a combination of circumstances which the defendants could not have foreseen, the burning of the cottage would not have occurred.

It was urged that this was a result which no reasonable person could have anticipated. This was a very far weaker case against the company than the one at bar, and the position of the counsel for the defendant was adopted by one of the judges. But the other members of the court were of opinion the evidence sustained the verdict, and they discharged the rule.

The chief justice, in giving his opinion, uses the following language: "It is said no reasonable man could have supposed that, even if the fire did communicate to the hedge, it would run across a stubble field and a public road, and so reach a building at the distance of two hundred yards from the railway. By seeing that the defendants were using dangerous machines, that they allowed the cuttings and trimmings to remain on the banks of their railway in a season of unusual heat and dryness, and for a time which, under these circumstances, might be fairly called unreasonable, and that there was evidence from which it might reasonably be pre-

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sumed that their engines caused the ignition of these combustible materials, and that the fire did, in fact, extend to the cottage, I think it impossible to say there was not evidence from which a jury might be justified in concluding that there was negligence as regards the plaintiff, and that the destruction of the cottage in which the plaintiff's goods were, was the natural consequence of their negligence; what the defendants' servants ought, as reasonable men, to have contemplated as the result of leaving the accumulation of cuttings and trimmings where and as they did, must depend on all the circumstances."

Counsel for appellee rely upon three adjudged cases in support of the decision of the Circuit Court. The first is *Marble v. Worcester*, 4 Gray. That was a case in which it was sought to recover damages, from the city by a person who had been thrown down and injured by a horse that had become frightened, freed himself from the vehicle to which he was attached, and run away. The recovery was sought against the city on the ground that the horse had been frightened by the striking of a vehicle against a defect in the highway. The plaintiff had nothing to do with the horse, and was fifty rods distant. The facts presented the question of proximate cause in a difficult and very debatable form, but it was held, by a divided court, that the city was not liable. The case bears but a faint analogy to the present one, and the subsequent case in 98 Mass., above cited, shows that the decision in *Marble v. Worcester* was not considered by the court that pronounced it as bearing upon the question presented by this record.

We now come to the two cases chiefly relied upon by appellee's counsel. They are quite in point, but we are wholly unable to agree with their conclusions. One is *Ryan v. The New York Central Railroad Co.*, 35 N. Y. 214, and the other is *Kerr v. The Pennsylvania Railroad Co.*, 62 Penn. St. 353 (1 Am. Rep. 431). These two cases stand alone, and we believe they are directly in conflict with every English or American case, as yet reported, involving this question.

As we understand these cases, they hold that, where the fire is communicated by the locomotive to the house of A, and thence to the house of B, there can be no recovery by the latter. It is immaterial, according to the doctrine of these cases, how narrow may be the space between the two houses, or whether the destruction of the second would be the natural consequence of the burning of the first.

The principle laid down by these authorities and urged by counsel in this case is, that, in order to a recovery, the fire which destroys the plaintiff's property must be communicated directly from the railway, and not through the burning of intermediate property. With all our respect for these courts, we cannot adopt this principle, and it is admitted by the judges who delivered the opinions to have no precedent for its support, and to be absolutely in conflict with former adjudications. Indeed, only one year prior to the decision in New York, the same court, in *Field v. New York Central Railroad Co.*, 32 N. Y. 345, pronounced a judgment which we cannot reconcile with the latter case.

It has often been held by this and various other courts, that, if fire is communicated to the dried grass of an adjoining field, through the carelessness of the persons managing a railway locomotive, and spreads over the field, no matter to what extent, destroying hay stacks, fences and houses, the company is liable. The correctness of these decisions is not assailed by appellee's counsel, and we have no doubt the same rule would be applied by the courts that decided the cases upon which counsel rely. But if these two decisions, in New York and Pennsylvania, are correct law, it must be held that, if fire is communicated from the locomotive to the field of A, and spreads through his field to the adjoining field of B, while A must be reimbursed by the company, B must set his loss down as due to a remote cause, and suffer in uncomplaining silence. Would there not be, in such a decision, a sense of palpable wrong, which would justly shock the public conscience and impair the confidence of the community in the administration of the law. While the law to be administered by the courts should not be a mere reflex of uneducated public opinion, at the same time it should be the expression of a masculine common sense, and its decisions should not be founded on distinctions so subtle that they might have afforded fitting topics to the schoolmen. If the field of A contains forty acres, and the whole is overrun by fire, he may recover for the whole. But if A owns twenty acres next to the railway, and B the remaining twenty acres of the same field, A shall recover, according to the doctrine of these cases, but B shall not. Yet, the test question is, what is the proximate cause of the fire, and this ruling makes the proximate cause depend upon whether the field of forty acres is owned by one person or by two.

Let us suppose another case. Both these opinions, upon which



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we are commenting, expressly admit, as both courts have decided, that if, through the negligence of a railroad company, fire is communicated to the building of A, he may recover. But suppose the building is a wooden tenement, one hundred feet in length, extending from the railway. In the Pennsylvania case, the second building was only thirty-nine feet from the first. We presume that court would hold, and appellee's counsel would admit, that A might recover for the value of his entire building one hundred feet in length. But suppose B owns the most remote fifty feet of the building. Could he recover? We suppose not, under the rule announced in these cases. But why should he not, under any definition of proximate cause that has ever been given by any court or text writer? Take that of Greenleaf, with which counsel for appellee claim to be content. He says the damage must be "the natural and proximate consequence of the act complained of." Is not the burning of the second fifty feet of the building in the case supposed, the natural and proximate consequence of the act complained of, to wit, the careless ignition of the first fifty feet? If it is admitted that there may be a recovery for the second fifty feet of the building as well as for the first, when there is one continuous building, and whether owned by one person or by two, is it possible that, when the second fifty feet is removed a short space from the first, but still is so near that the burning of the one makes almost certain the destruction of the other, there can be no recovery?

Is not the burning of the second building still "the natural and proximate consequence of the act complained of?" It seems to us that the arbitrary rule enforced in these two cases, which is simply this, that when there is negligence, there may be a recovery for the first house or field, but in no event for the second, rests on no maintainable ground, and would involve the administration of the law in cases of this character in absurd inconsistencies. We believe there is no other just or reasonable rule than to determine in every instance whether the loss was one which might reasonably have been anticipated from the careless setting of the fire, under all the circumstances surrounding the careless act at the time of its performance. If loss has been caused by the act, and it was, under the circumstances, a natural consequence which any reasonable person could have anticipated, then the act is a proximate cause, whether the house burned was the first or the tenth, the latter being so situated that its destruction is a consequence reasonably to be anticipa-

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ted from setting the first on fire. If, on the other hand, the fire has spread beyond its natural limits by means of a new agency — if, for example, after its ignition, a high wind should arise, and carry burning brands to a great distance, by which a fire is caused in a place that would have been safe but for the wind — such a loss might fairly be set down as a remote consequence, for which the railway company should not be held responsible.

The Court of Appeals in New York, and the Supreme Court in Pennsylvania seem, from their opinions, to have attached great weight to an argument urged upon us by the counsel for appellee, and indeed that argument seems to have been the chief reason for announcing a rule which both courts struggle in vain to show is not in conflict with all prior adjudications. That argument is, in brief, that an entire village or town is liable to be burned down by the passing of the fire from house to house, and if the railway company, whose locomotive has emitted the cinders that caused the fire, is to be charged with all the damages, these companies would be in constant danger of bankruptcy, and being obliged to suspend their operation. We confess ourselves wholly unable to see the overpowering force of this argument. It proceeds upon the assumption that, if a great loss is to be suffered, it had better be distributed among a hundred innocent victims than wholly visited upon the wrong-doer.

As a question of law or ethics, the proposition does not commend itself to our reason. We must still cling to the ancient doctrine, that the wanton wrong-doer must take the consequences of his own acts, whether measured by a thousand dollars or a hundred thousand.

As to the railroads, however useful they may be to the regions they traverse, they are not operated by their owners for benevolent purposes, or to promote the public welfare. Their object is pecuniary profit. It is a perfectly legitimate object, but we do not see why they should be exempted from the moral duty of indemnifications for injuries committed by the careless or wanton spread of fire along their track, because such indemnity may sometimes amount to so large a sum as to sweep away all their profits. The simple question is, whether a loss, that must be borne somewhere, is to be visited on the head of the innocent or the guilty. If, in placing it where it belongs, the consequences will be the bankruptcy of a rail-

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way company, we may regret it, but we should not, for that reason, hesitate in the application of a rule of such palpable justice.

But is it true that railroads cannot thrive under such a rule? They have now been in operation many years, and extend over very many thousand miles, and we have never yet heard of town or village that has been destroyed by a fire ignited by their locomotives. Improved methods of construction, and a vigilant care in the management of locomotives, have made the probability of loss from this cause so slight that we cannot but regard the fears of the disastrous consequences to the railway companies which may follow from an adherence to the ancient rule, as in a large degree chimerical. A case may occur at long intervals in which they will be required to respond in heavy damages; but better this, than that they should be permitted to evade the just responsibilities of their own negligence, under the pretense that the existence of the road may be endangered. It were better that a railway company should be reduced to bankruptcy, and even suspend its operations, than that the courts should establish for its benefit a rule intrinsically unjust, and repugnant not merely to ancient precedent, but to the universal sense of right and wrong.

Our position on this subject is briefly this: We do not desire to impose upon the railway companies unreasonable obligations, or to subject them to unreasonable danger of great pecuniary loss. We do not wish to make them insurers against all damages by fire that may result from the passage of their trains, without reference to the question of remote and proximate cause. But, on the other hand, we do insist on applying to them the same rule that has been held through all the administration of the common law, with the exception of the two cases upon which we have been commenting. As already stated, we understand the doctrine of those two cases, and the position by the counsel for appellee to be, that, if fire is communicated from a locomotive to the house of A, and thence to the house of B, it is a conclusion of law that the fire sent forth by the locomotive is to be regarded as the remote, and not the proximate, cause of the injury to B; and the railway company is, for this reason alone, to be held not responsible. This rule we repudiate as in the teeth of almost numberless decisions, and as unsupported by that reason which is the life of the law.

We hold, on the contrary, as we held in reference to this same fire in the case of *The T., P. & W. R. R. Co. v. Pindar*, 53 Ill. 451

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(5 Am. Rep. 57), that it is in each case a question of fact, to be determined by the jury under the instructions of the court. Those instructions should be, in substance, what we have already stated. If the fire is the consequence of the carelessness of the railway company, and the question of remote or proximate cause is raised, the jury should be instructed that, so far as the case turns upon that issue, the company is to be held responsible, if the loss is a natural consequence of its alleged carelessness which might have been foreseen by any reasonable person, but is not to be held responsible for injuries which could not have been foreseen or expected as the results of its negligence or misconduct.

In the case before us, owing to the distance of the plaintiff's building from the one first set on fire, this question might not have been one of easy determination. The defendant, however, thought it better not to take the risks of this issue, but, by a demurrer to the evidence, to rest his defense upon the theory that, even admitting all that the evidence tends to prove, there is still no liability.

In this court, the counsel for the company have not discussed the evidence. They place the case on the single ground, that the company is free from liability, because the plaintiff's house was set on fire, not immediately by cinders thrown from the locomotive, but by the burning of another house. Their position is, that this alone exonerates the company, without any reference whatever to the question whether the second house was so near the first that in the then state of the wind and weather, its destruction was a natural consequence of the burning of the first, which any reasonable person could have foreseen and would have expected. This question they have not discussed.

On the legal question upon which appellee's counsel thus rest the case, we cannot adopt their views.

On the demurrer to the evidence, we must hold it tended to prove that the fire escaped through the carelessness of the defendant, and that the destruction of the plaintiff's house was its natural consequence, which any reasonable person could have foreseen. The demurrer should, therefore, have been overruled.

The judgment is reversed, and the case remanded for trial.

*Judgment reversed.*

BOWEN, appellant, v. RUTHERFORD.

(83 Ill. 41.)

*Partnership — evidence of.*

In an action against A and B as partners, B denied that he was a partner of A. *Held*, that evidence that B held himself out as a partner was not admissible to prove the partnership. A partnership cannot be proved by general reputation.

ACTION by James H. Bowen, George S. Bowen, Chauncey T. Bowen and George R. Whitman against Robert B. Rutherford and Robert Rutherford, on certain notes purporting to have been executed by defendants as partners. Robert Rutherford pleaded that he did not execute the notes, and that he was not a partner of the other defendant. There was a verdict in favor of Robert Rutherford, and from a judgment thereon plaintiffs appealed.

*Thompson & Bishop*, for appellants.

*John W. Kreamer*, for appellee.

THORNTON, J. There was no error in the rejection of the evidence offered, that appellee held himself out as a member of the firm. The offer was too general, and the only inference to be drawn from it is, that the design was to prove the partnership by general reputation, and thus make both defendants liable for the act of one.

Such testimony was held competent in *Whitney v. Sterling*, 14 Johns. 214, and in *McPherson v. Rathbone*, 11 Wend. 97.

In the first case, the court remarked that there was no objection to the testimony of general reputation, and it must therefore be considered. In the last case, it is simply said that it is undoubtedly competent to prove the partnership by general reputation. No authority is referred to in either case, and no argument offered in favor of the rule established.

The propriety of these decisions was seriously questioned in an able opinion by COWEN, J., in *Halliday v. McDougall*, 20 Wend. 81. He said : " There is scarcely a question upon which common reputation is more fallible. A contract of partnership is, in its nature,

incapable of being defined by laymen ; and whether an apparent partnership be really so, or a contract of some other character, is often a most embarrassing legal question with the ablest lawyer. General reputation of the more ordinary contracts, the legal nature and effect of which are understood by men of business in general, would be a much more proper subject of proof by general report. This, the law always rejects, and yet I am not aware that there is any necessity for a resort to such proof, in the one case more than the other."

We have been furnished with no authority in favor of the rule, and are aware of none, either English or American, which goes to the extent of the earlier cases in New York.

In *Brown v. Crandall*, 11 Conn. 92, it was decided that general reputation was inadmissible to prove a partnership. In this case, the court said : "A person of doubtful credit might cause a report to be circulated that another person was in partnership with him, for the very purpose of maintaining his credit. His creditors might also aid in circulating the report for the purpose of furnishing evidence to enable them to collect their debts." See, also, *Bryden v. Taylor*, 3 Harr. & Johns. (Md.) 496.

It is a fundamental principle of the law of evidence, recognized and approved from the earliest times, that hearsay is not generally to be admitted in courts of justice. There are certain exceptions to the rule, but reputation of partnership has never been regarded as one of them.

The exceptions have been allowed, because it has been supposed that greater inconvenience might arise from the exclusion than the admission of the exception.

The mischiefs resulting from the admission of general report in proof of partnership, either between the parties or as to third persons, would be ten-fold greater than its exclusion. Creditors, by ordinary precaution and inquiry, can protect themselves from imposition. They need not part with money or goods until they ascertain the fact of partnership, or the joint liability of the persons to whom the credit is given. On the other hand, the innocent might be involved in difficulty, and ruined by a reputation created by bad and designing men.

Whether persons are partners *inter se*, or *quoad* third parties, must be established by facts ; by the acts of the party ; or, by circumstantial evidence, which induces the belief of a partnership.

## Home Mutual Fire Insurance Co. v. Garfield.

The question turns upon the assent of the persons to be charged, and not upon general repute.

A contract of this character, which often perplexes the closest inquiry, should not be determined by the loosest of all testimony, excited, perhaps, by interested creditors.

The modification of the second instruction was right. It required that the jury should find that the goods were furnished upon the belief that appellee was a partner. If this was not true, then the appellants were not injured. They must be influenced and induced to give the credit by the indirect representations of the party arising from his conduct. There must also be such publicity in the acts of the party charged, as to afford the reasonable presumption that the creditor had a knowledge of them, and acted upon such knowledge. The law presumes that the party who thus holds himself out as a partner, does so voluntarily, and that the creditor, under the belief of a partnership, gave the credit. *Waugh v. Carver*, 1 H. Black. 235; *Fox v. Clifton*, 6 Bing. 776; *Dickinson v. Valpy*, 10 Barn. & Cress. 128.

The law applicable to the facts was fully and correctly stated in the instructions given. (The judge here considered some unimportant questions.)

*Judgment affirmed.*

## HOME MUTUAL FIRE INSURANCE Co., appellant, v. GARFIELD

(80 Ill. 124.)

*Fire insurance — interest of insured — re-building by insurers.*

A policy of fire insurance provided that "if the interest in the property to be insured be \* \* \* not absolute, it must be so stated in the policy, otherwise the same shall be void." In reply to the question, "What is the title, and whether incumbered by mortgage or otherwise \* \* \*" the answer was "Fee simple." The policy was payable to R., who, at the date thereof, had a mortgage on the property. The existence of the mortgage was known to the agent and to the vice-president of the insurance company. *Held*, that there was no concealment of the true character of the title and that the policy was valid.

The charter of a fire insurance company provided that the directors should pay all losses within three months unless they should judge it proper within that time to re-build or repair. In conformity with these provisions, the insured

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Home Mutual Fire Insurance Co. v. Garfield.

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was notified that the company elected to re-build the building insured, which had been destroyed by fire. *Held*, that it was error to charge the jury that "the company was bound to re-build the building destroyed, cost what it may." If the company neglected within a reasonable time to carry out its notice to re-build, the insured might disregard it, sue upon the policy and recover the amount of the policy and interest and the rental value of the ground during the time of the delay.

ACTION upon a policy of fire insurance by Albert G. Garfield against The Home Mutual Fire Insurance Company. The opinion states the case.

*Sleeper & Whiton*, for appellant.

*A. N. Waterman*, for appellee.

THORNTON, J. This is an action of covenant upon a policy of insurance brought by the insured against the company. After the destruction of the property by fire, a notice to re-build was given according to a clause contained in the policy.

The objections to the form of the action and the right of the plaintiff to sue cannot be availed of here. These were raised by demurrer in the court below, as the declaration sets forth at length the policy and the notice to re-build. This having been overruled, special pleas were filed. The appellant should have abided by his demurrer if he desired to present the question raised by it to this court. *Russell v. Whiteside*, 4 Scam. 8; *American Express Co. v. Pinckney*, 29 Ill. 406.

Appellant is a mutual insurance company, and insured the property of appellee to the amount of \$5,000. The application and policy contain these words: "Loss, if any, payable to Wm. C. Reynolds, trustee, or order, as his interest may appear." By the policy, the company promised to pay the sum insured "within three months next after the property shall be burnt, destroyed or demolished by fire, and notice thereof given by the act during the time this policy shall remain in force, unless the directors shall, within said three months, determine to re-build or replace the property destroyed." In condition VII, annexed to the policy, and a part of it, it is declared that, "If the interest in the property to be insured be a leasehold interest, or other interest not absolute, it must be so stated in the policy, otherwise the same shall be void."



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Section 14 of the charter is as follows: "The directors shall settle and pay all losses within three months after they shall have been notified as aforesaid, unless they shall judge it proper within that time to re-build the house or houses destroyed or repair the damages sustained, which they are empowered to do in a convenient time, *provided they do not lay out and expend in such buildings or repairs more than the sum insured on the premises,*" etc.

It further appears, that in reply to the question, "What is the title, and whether incumbered by mortgage or otherwise, and to what amount," the answer was, "Fee simple." The proof shows that, at the date of the policy, Reynolds held an incumbrance on the property to the amount of \$10,000.

It is insisted that the fraudulent concealment of the title rendered the policy void. Campbell, an agent of the company, testified, substantially, that Reynolds called in the office and said he had been making a loan to Garfield; that Garfield had a policy but it was not satisfactory, and that he desired one in the Home Mutual, and requested him to take a survey of the building. He made the survey, and then consulted with the vice-president, and wrote the application in the office of the company. Upon cross-examination, he said: "The matter was all talked over between Reynolds and the vice-president." From both the policy and outside information, the officers of the company had full knowledge of the loan and incumbrance. They knew that Reynolds wanted the insurance effected for the better security of the money he had loaned. They knew, from the policy itself, that there was an incumbrance. Proof of a fee-simple estate, accompanied with these explanatory circumstances, would be a compliance with the seventh condition attached to the policy. To permit the company to have the benefit of this stringent provision, with the evidence before us, would be to countenance the perpetration of a gross fraud.

The proof was that the assured party, at the time of the insurance, had a fee-simple title, subject to an incumbrance. This was mentioned in the policy. The company had notice of it, and should have made further inquiry or rejected the application. There was not a concealment of the true character of the title, and consequently no fraud practiced. This is not like the case of the *Illinois Mutual Insurance Co. v. Marseilles Manufacturing Co.*, 1 Gilm. 236. In that case, the court said: "Neither of the policies, or the applications which are parts of the policies, express that the

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title of the defendants in error to the land was less than an estate in fee simple, or that the same was incumbered," and therefore they were properly declared void. In this case, the disclosure was sufficient when the policy informed the company that Reynolds had a lien upon the property.

In determining the meaning and effect of the answer as to the title to the property, we should consider the application and policy together. In this view, the answer to the question as to title and incumbrance was, "Fee simple, subject to the lien of Reynolds." We do not, therefore, think that the policy was void.

It is claimed that the suit was not instituted in proper time, under the charter of the company. We have examined the stipulation of the parties, and do not think this defense can now be made.

All other questions raised may be resolved into one: What is the liability of the appellant? As authorized by the policy, a notice to re-build was given, and is as follows:

"ALBERT G. GARFIELD, Esq., *Chicago*:

"DEAR SIR: In conformity with the provisions of policy No. 5881 of the Home Mutual Fire Insurance Company, of Illinois, you are hereby notified that the company elects to re-build the four story frame building formerly situated on the south-west corner of Franklin and Tyler streets, in the city of Chicago, and occupied as a tin-ware manufactory, being the same premises insured under the above-described policy of insurance, and destroyed by fire on or about the 21st day of February, 1868.

"Every other right existing under the same policy of insurance is hereby expressly reserved. You are hereby requested to furnish, at the earliest practicable moment, plans and specifications of the construction of the building in accordance with the customs of insurance in such cases of loss adjustments.

"Yours, Truly,

"April 24, 1868."

"J. K. MURPHY, *Secretary*."

It is assumed that this notice changed the policy — changed the entire character of the contract — and that, thereby, the company agreed to replace the property destroyed, without any reference to the amount of the cost.

It is urged that the policy is in the nature of an alternative contract, and the company, in giving the notice and making its election, made it an absolute contract to re-build, and having failed to

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re-build, became liable for all damages for breach of such contract. The policy is not in the alternative, to pay a sum of money or to re-build the house. The language is, "to pay the sum insured unless the directors shall determine to re-build." It is equivalent to saying, I will pay a sum certain if I fail to re-build. The company merely reserved the right to replace the property, to avoid the payment of the money. Its liability was for the money, to be discharged by the performance of some other act. This conduct on the part of the company in giving notice should be looked upon with disfavor, unless good faith is manifested in all its subsequent proceedings. Upon the notice to re-build, it should proceed immediately with the work.

It was error to instruct the jury that "the company was bound to re-build the building destroyed, *cost what it may.*" Section 14 must be construed as a limitation upon the company in the expenditure of money; hence, the instruction announced an erroneous measure of damages.

This section must be interpreted with some regard to the language used, and the object in its adoption. It restricted the extent of liability and the notice could not render the company liable as assumed in the instruction. The effect of giving the notice was not to change the contract so as to make it a mere contract to re-build.

What, then, was the effect of the notice? It hindered the assured in the enforcement of the policy; it gave the company the right to take possession of the ground for the purpose of building. If prompt measures are not adopted to re-build, what is the remedy of the assured, and what is the measure of damages? If the company neglected, within a reasonable time after notice, to carry out its evident intention, the assured might disregard it and sue upon the policy, and, with proper averments in the declaration, recover the amount of the policy and interest, and the rental value of the ground during the time of the delay thus caused by the act of the company. The right to the latter, under the circumstances stated, would naturally result from the act of the company.

For the error in giving the instruction, the judgment is reversed and cause remanded.

*Judgment reversed.*

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Ryan v. Chicago & Northwestern Railway Co.

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RYAN, appellant, v. CHICAGO & NORTHWESTERN RAILWAY CO.

(60 ILL. ILL.)

*Master and servant — injury to servant through the negligence of co-servant.*

Plaintiff was employed by a railroad company as a laborer in their carpenter shop, and while returning home after his day's work was done, he had occasion to cross the company's tracks, when he was struck and injured by one of their engines. *Held*, that the company was liable for the negligence of the enginemen, the employment of those in charge of the engine and of plaintiff as laborer in the carpenter shop being dissimilar and separate.

ACTION by Andrew Ryan, against The Chicago & Northwestern Railway Company to recover for injuries received by plaintiff, through the alleged negligence of defendants. The opinion states the case.

*Fuller & Smith*, for appellant.

*B. C. Cook*, for appellees.

WALKER, J. This was an action on the case, brought by appellant, in the Superior Court of Chicago, against appellees, to recover for injuries received by being struck by one of the engines of the company. Appellant was employed by the company as a common laborer at their carpenter shop in Chicago. And on the 22d day of February, 1868, after the six o'clock whistle had sounded to release the hands from labor, appellant started for his home. He, in going there, crossed appellee's railway tracks, and in doing so, was struck by one of their engines and severely injured. Appellant testifies that on approaching the track, he looked along in both directions, and no engine was in sight, and the engine which struck him came upon him from the opposite side of the tank house on a curve on the main track ; that no bell was ringing or whistle sounding, and the engine run at an unusual rate of speed.

On the other side, witnesses swore that the bell was ringing, the engine was moving at a rate of speed not exceeding five miles an hour, and that the track was straight, and the engine could be seen

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at least two hundred feet in the direction from which it came. Each party prepared and asked instructions, which the court refused to give, but, on his own motion, gave this :

“ If the plaintiff was in the service of defendants, and his route to and from his work was over the tracks of the defendants’ railway, then the law is established in this State that he took upon himself the risk of being hurt by passing engines on such tracks, and the defendants are not liable to him for any injury that he received from such engine, whether it was run negligently or not, and the verdict should be for the defendants.”

The giving of which is assigned for error.

This instruction took from the jury all question of negligence, and only left to their consideration the fact whether or not he was in the employment of the railroad company.

In *Chicago & Alton Railroad Co. v. Keefe*, 47 Ill. 110, we said, “ That the duties of an employee of a railway company may be so entirely distinct from all occupation upon its trains as to leave him at liberty to pursue the same legal remedies for injuries received while a passenger, may very probably be true. If, for example, a book-keeper in a railway office should be injured, while traveling as a passenger, through the carelessness of the engineer, the reasons upon which the rule above referred to are founded, might well be held to have no application. But the employment of the person injured cannot be considered distinct, in any sense, leading to this result, *if of a character* to make him a part of the force employed upon the train. If his duties attach him to the train as a part of its personal equipment, then his branch of service is not independent, in any such sense, as to exempt him from the general rule in regard to co-employees, in case he should be injured through the carelessness of the engineer. \* \* \* In the case before us, the plaintiff was a part of the working force of a construction train, and had been for some weeks passing with it to and fro, and, although his duties were distinct from those of the engineer, yet they were fellow-servants of the company, and both engaged in the same general duty, to wit: the operating a construction train, though each worked in his own department.”

In the case of *The Chicago & Northwestern Railroad Co. v. Swett*, 45 Ill. 197, we held that the doctrine that an action would not lie by a servant against a railroad company for an injury sustained through the default of another servant, applies only to cases where

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**Ryan v. Chicago & Northwestern Railway Co.**

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the injury complained of occurs without the fault of the company, either in the act which caused the injury or the employment of the person who caused it. Again, in the case of *The Schooner Norway v. Jensen*, 52 Ill. 373, it was held that a master is responsible to his servant for an injury received from defects in the structure or machinery about which his services are rendered, which the master or should have known. And the *Illinois Central Railroad Co. v. Welch*, 52 Ill. 183, announces the same rule. In this last case it was said that a person engaging in such a service assumes the ordinary perils of railroad life, and the special dangers peculiar to the condition of the road, so far as he is aware of their existence, and his exposure to them would be his voluntary act.

In the case of *Illinois Central Railroad Co. v. Jewell*, 46 Ill. 99, it was said, where the engine driver was a reckless and wild runner, which was known to the company, that the company were liable for injuries resulting therefrom to a fellow-servant. From these decisions it will be seen that the rule that a servant cannot recover against a railroad company, for injuries, has its exceptions. And those exceptions depend upon the negligence of the master in furnishing insufficient structures or machinery with which the servant is required to perform his duties, or in employing incompetent servants with whom the servant is associated in the discharge of his duties. Or where a servant is employed in a different department of the general service from that of those whose negligence produced the injury, as was said in the case of *The Chicago & Alton Railroad Co. v. Keefe*, *supra*. And the same principle is announced in the case of *Lalor v. Chicago, Burlington & Quincy Railroad Co.*, 52 Ill. 401. Thus, it is seen, the rule is not inflexible and without exception.

No employee of the road could have been farther removed from those who produced the injury, than the appellant. He was in nowise connected with those who had control of the engine. He was engaged in a different department of the business of the company; as wholly disconnected with the business of operating the engines and trains as was any mechanic or laborer in the city. It is true he was employed and paid by the same company, but otherwise a stranger to the engineers' department. The reason of the rule, when it is applicable, is, that each servant engaged in the same department of business, for the safety of all, shall be interested in securing a faithful and prudent discharge of duty by his

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fellow-servants, or that they shall report to the master any delinquencies of those engaged with them in the performance of duty. But the reason does not, nor can it, apply where one servant is employed in a separate and disconnected branch of the business from that of another servant. A person employed in the carpenter shop cannot be required to know of the negligence of those intrusted with running trains or handling engines on the road. And hence the reason of the rule fails.

The employment of the engine driver, and appellant as a laborer in the carpenter shop, is so dissimilar and separate from each other, that appellant should not be held responsible for the negligence of the former. In such a case, the company should be held liable for gross negligence of the servant who causes the injury. But the instruction in this case took that question entirely from the jury, and should not have been given. It entirely ignored the exception to the rule.

There was evidence which was conflicting on the question of gross negligence, and it was the province of the jury, and not of the court, to pass upon it and say which position should be regarded.

For this error, the judgment of the court below must be reversed and the cause remanded.

*Judgment reversed.*

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BRENT, appellant, v. KIMBALL

(30 Ill. 211.)

*Trespass — liability for killing a dog.*

Defendant killed a dog which was on his premises but doing no damage. *Held*, that he was liable to the owner of the dog in an action of trespass.

ACTION by James K. Brent against Samuel H. Kimball, for the alleged wrongful killing of plaintiff's dog. The opinion states the case.

*Batchelor*, and *Phelps & Stewart*, for appellant.

*John Porter*, and *Glenn & Willits*, for appellee.

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**MCALLISTER, J.** This was an action of trespass, brought by appellant against appellee, for the alleged wrongful killing, by the latter, of appellant's dog.

The evidence shows, without conflict, that, as the dog in question was passing along the highway, some boys scared him into appellee's yard, whereupon the latter came out with his gun and shot him.

Appellee does not pretend, in his evidence, that the dog, at the time of the killing, was doing any mischief to persons or property, but claims, more, as it seems, upon suspicion than knowledge, that the dog had previously destroyed his hens' nests or eggs.

If the dog had a vicious habit, and appellant had previous notice of it, an action would lie against him for the damage done by his dog. But it does not follow that the party injured may justify the killing of the dog for that reason, any more than he could the killing of a breachy animal for breaking into his corn.

The common-law liability of the owner of the dog is made absolute in a specified class of cases by the statute, without notice to him of any vicious habit. The 1st section of the act of 1858 (Gross' Stat. 45) declares that the owner of any dog shall be liable in an action on the case for all damages that may accrue to any person by reason of such dog killing, wounding, or chasing any sheep, or other domestic animal. And the 2d section authorizes any person, who shall discover any dog in the act of killing, wounding, or chasing sheep, or discover such dog under such circumstances as to satisfactorily show that the dog had been recently engaged in killing, or chasing sheep for the purpose of killing them, to immediately pursue and kill such dog.

The act of 1861 (Gross' Stat. 45) authorizes the county courts, or boards of supervisors in the counties, to impose a tax upon dogs, and make such other regulations within their counties as they may deem advisable in relation to dogs, and then declares that, when such orders or regulations are made, any owner of a dog who shall refuse or neglect to comply with them, shall not recover for any killing or injury done to his dog, and shall also be liable to a fine of \$10, to be recovered as therein provided.

Except in the cases where a dog is discovered in the act of killing, wounding, or chasing sheep, or under such circumstances as to satisfactorily show that he has been recently so engaged, the cases provided for by the statute, and except where he has been recently



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bitten by another dog which is mad, or may be reasonably supposed to be so, or where a dog is ferocious and attacks persons, we do not know that any one, besides the master, has a right to kill it. *Hinckley v. Emerson*, 4 Cow. 351, and cases there cited.

The court below instructed the jury, on behalf of appellee, that it was incumbent on the plaintiff to show, by a preponderance of evidence, that the dog killed by defendant was the property of the plaintiff, and of some pecuniary value; and unless they so believe from a preponderance of evidence, they should find for the defendant.

This instruction was manifestly wrong. The law recognizes the right of property in dogs. The one in question was owned by the appellant; this was established by uncontroverted evidence. If, therefore, appellee destroyed this property without legal justification for the act, appellant was entitled to recover at least nominal damages, without proving that the animal was of any pecuniary value whatever. The injury imports damages. It was an invasion of appellant's right of property. Suppose appellee had ridden over appellant's land without authority, the latter could have maintained an action of trespass, though the act did him no damage, because it was an invasion of his property, and the other had no right to come there.

The observations of HOLT, Ch. J., in *Ashby v. White*, 2 Ld. Raym. 955, are very pertinent to this question. "Surely," he said, "every injury imports a damage, though it does not cost the party one farthing, and it is impossible to prove the contrary; for a damage is not merely pecuniary, but an injury imports a damage when a man is thereby hindered of his right. As in an action for slanderous words, though a man does not lose a penny by reason of the speaking them, yet he shall have an action. So, if a man gives another a cuff on the ear, though it cost him nothing, no, not so much as a little *diachylon*, yet he shall have his action, for it is a personal injury. So, a man shall have an action against another for riding over his ground, though it does him no damage; for it is an invasion of his property, and the other has no right to come there."

For the error in giving the instruction stated, the judgment of the court below must be reversed and the cause remanded.

*Judgment reversed.*

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Tyler v. Western Union Telegraph Co.

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TYLER, appellant, v. WESTERN UNION TELEGRAPH COMPANY.

(60 Ill. 481.)

*Telegraph company — printed conditions in message. Measure of damages for errors.*

Plaintiff sent a message by defendant's telegraph. The message was written in a blank containing a printed condition that defendant would not be "responsible for any error or delay in the transmission \* \* \* of any unrepeatable message" without additional charges. The message directed the sale of 100 shares of stock. It was transmitted so as to direct the sale of 1,000 shares, and was not repeated. *Held*, that the condition in the message did not relieve the defendant from liability for errors arising from its own negligence; that the error was *prima facie* evidence of defendant's negligence; and that the measure of damages was the amount paid by plaintiff, by reason of an advance in price of stock, to replace the excess of 900 shares sold in obedience to the erroneous message.

A condition in a telegraph blank upon which a message is written exempting the company from liability for unrepeatable messages is not a contract binding in law. (*See note, p. 53.*)

ACTION by Tyler, Ullman & Co., against The Western Union Telegraph Company, to recover damages resulting from alleged negligence in the transmission of a message. The opinion states the case.

*Rogers & Garnett*, for appellants.

*Dent & Black*, for appellees.

BREESE, J. This was an action of assumpsit to recover damages of the Western Union Telegraph Company for alleged carelessness in transmitting a dispatch for appellants from Chicago to the city of New York. The delivery of the message at the company's office in Chicago to the operator there, by one of the plaintiffs, is alleged, and proper averments of negligence and carelessness on the part of the company are found in the declaration, and proper averments of damage. The defendant pleaded non-assumpsit, with notice of special matter.

It appears the message was written on one of the blanks prepared by the company which contained the following stipulations

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Tyler v. Western Union Telegraph Co.

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"In order to guard against and correct, as much as possible, some of the errors arising from atmospheric and other causes appertaining to telegraphy, every important message should be *repeated* by being sent back from the station at which it is to be received, to the station from which it is originally sent.

"Half the usual price will be charged for repeating the message, and the companies will not hold themselves responsible for errors or delays in the transmission or delivery, nor for the non-delivery of *repeated messages*, beyond two hundred times the sum paid for sending the message, unless a special agreement for insurance be made in writing, and the amount of risk specified on this agreement and paid at the time of sending the message. Nor will these companies be responsible for any error or delay in the transmission or delivery, or for the non-delivery of *any unrepeatd message* beyond the amount paid for sending the same, unless in like manner specially insured, and amount of risk stated hereon and paid for at the time.

"No liability is assumed for errors in cypher, or obscure messages, nor for any error or neglect by any other company over whose lines this message may be sent to reach its destination, and these companies are hereby made the agents of the sender of this message to forward it over the lines extending beyond those of these companies. No agent or employee is allowed to vary these terms or make any other verbal agreement, nor any promise as to the time of performance, and no one but a superintendent is authorized to make a special agreement for insurance. These terms apply through the whole course of this message on all lines by which it may be transmitted."

The message when written, and as delivered to the operator at Chicago, read as follows :

"Dated CHICAGO, Oct. 29, 1866.

"To J. H. WRENN or A. T. BROWN :

"Sell one hundred (100) Western Union. Answer price.

"T., U. & Co."

As delivered to Wrenn, in New York, the message read as follows :

"Dated CHICAGO, ILL.

"To J. H. WRENN, care GILLMAN, SON & Co. :

"Sell one thousand (1000) Western Union. Answer price.

"T., U. & Co."

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It is averred in the declaration that Wrenn understood the words "one hundred Western Union" to mean one hundred shares in the Western Union Telegraph Company, which number of shares, it appears, the banking house of plaintiffs was then carrying for a customer. On receipt of the message, Wrenn sold one thousand shares of this stock, and to do so, was obliged to go into the market and purchase nine hundred shares, to replace which he had to buy on a rising market the same number of shares, so that the difference in the selling and buying price amounted to \$729.77, which amount was wholly lost to the plaintiffs.

The court, on its own motion, having refused instructions asked by plaintiffs, charged the jury as follows :

"The dispatch in question, in this case, being sent upon one of the printed blanks of defendant, the printed heading of that blank constitutes a contract between the parties, by the terms of which both parties are bound ; and as one of these terms is, that the defendants are not liable for any errors in the transmission of an unrepeatd message beyond the amount paid for sending the same, the plaintiffs can only recover that amount, with interest on the same, from the time it was paid to this time, in this suit. Transmission means all that happens from the receipt of the dispatch here from the plaintiffs, and its delivery to them in New York."

It was admitted the message in question was not repeated.

The jury found for the plaintiffs, assessing their damages at \$2.60, being the cost of the message, with interest.

A motion for a new trial was overruled and judgment rendered on the verdict, to reverse which the plaintiffs appeal, and make several points, one of which is the refusal of the instructions asked by them on the trial of the cause.

These instructions are as follows :

"If the jury believe, from the evidence, that the dispatch sent by Tyler, Ullman & Co. to John H. Wrenn, on the 29th day of October, 1866, was erroneously and negligently read by the operator in Chicago, and that said dispatch was transmitted to said Wrenn in the words as received by him, on account, and as the result of such erroneous and negligent reading by the operator in Chicago, then the verdict must be for the plaintiffs if they suffered pecuniary loss by such error and negligence."

"If they believe, from the evidence, that the dispatch sent by Tyler, Ullman & Co. to John H. Wrenn, on the 29th day of Octo-

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ber, 1866, was correctly transmitted from Chicago to New York, and was correctly received in New York at the office of the said defendants, yet if they believe, from the evidence, that said dispatch, although correctly received by defendants, was erroneously and negligently transcribed by their agents in New York, and was delivered by said agents to said Wrenn so erroneously and negligently transcribed, and that such error caused any pecuniary loss and damage to the plaintiffs, then the verdict must be for the plaintiffs."

"If they believe, from the evidence, that a mistake was made in transmitting the message through the gross negligence of defendants, or their servants, and that plaintiffs suffered damage by reason of such mistake in transmitting said message, the defendants are responsible for such damage; although the jury may believe, from the evidence, that plaintiffs used one of the forms of defendants, having the terms printed at the top, as shown by the form copied in the notice accompanying defendants' plea, and that said plaintiffs assented and agreed to such terms, and did not require said message to be repeated, or its correct transmission insured."

"That plaintiffs were not bound by the terms printed at the top of the forms commonly used by defendants, as set out in the form copied in defendants' notice accompanying their plea, if they delivered their message to defendants for transmission by telegraph, and defendants accepted it for that purpose, without plaintiffs' consent or agreement to be bound by such terms."

These instructions, in connection with that given by the court, open up the merits of this controversy, and we have given to the questions raised by them full consideration. It is a case of the first impression in this court, requiring us to examine all the authorities cited, and such others as were within our reach, and we find them not entirely harmonious. It is contended by appellants that telegraph companies are common carriers, and under the same common-law liabilities.

In the earlier cases reported they were so held. *McAndrew v. The Electric Telegraph Co.*, 17 C. B. 3, decided in 1855. It was also held that they could restrict their liability by contract, and that the paper containing the message, signed by the plaintiff, which was identical with the one in this case, was such contract.

They were also held to be common carriers in *Parks v. Alta California Telegraph Co.*, 13 Cal. 422, decided in 1859. The coun

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sel for the company argued against this proposition, and contended that the rules of the common law governing common carriers did not apply to telegraph companies. He insisted that they could not be regarded as insurers, for the reason that a message is without value. The court said there was no difference in the general nature of the legal obligation of the contract between carrying a message along a wire and carrying goods or a package along a route. The physical agency may be different, but the essential nature of the contract is the same. The breach of contract in one case or the other is, or may be, attended with the same consequences ; and the obligation to perform the stipulated duty is the same in both cases. The importance of the discharge of it, in both respects, is the same. In both cases the contract is binding, and the responsibility of the parties for the breach of duty is governed by the same general rules.

Strong reasons might be urged in favor of holding these companies to the severe liabilities of common carriers, but the current of authority at this time is not, as admitted by appellants, in that direction. Whilst their liability is held to be analogous to that of common carriers who are insurers of the safe delivery of the articles intrusted to them, it is considered, in view of the means employed by telegraph companies to transmit messages, and their liability to sudden accidents which cannot be foreseen and provided against, to hold them as insurers of the safe delivery of every message intrusted to them would be too rigid a rule. Cases so holding, hold, nevertheless, that they are liable for a failure to exercise the highest degree of diligence and skill in the performance of their duty.

The case of *Rittenhouse v. The Independent Line of Telegraph*, 44 N. Y. 263 (4 Am. Rep. 673), is one of this description. There it was held, the failure to transmit a message in the form in which it was received by the operator was *prima facie* negligence, for the company is liable, and the *onus* is on the company to show which the mistake occurred by no fault of their own.

This case came up from the Court of Common Pleas, and is reported in 1 Daly, 547, and was an unreported message.

To the same effect is *New York and Washington Printing Telegraph Co. v. Dryburg*, 35 Penn. 298. This action was in tort, and brought by the receiver of the message. The court say, the wrong of which the plaintiff complained consisted in sending him a mes-

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message different from that which they had contracted with Le Roy to send. That it was a wrong is as certain as that it was their duty to transmit the message for which they were paid. Though telegraph companies are not, like carriers, insurers for the safe delivery of what is intrusted them, their obligations, as far as they reach, spring from the same sources — the public nature of their employment, and the contract under which the particular duty is assumed. One of the plainest of their obligations is to transmit the very message received.

They further say, the company claimed that their operator was a skillful and careful one. Then his negligence in this instance was the more apparent and inexcusable.

In *Elwood et al. v. The Western Union Telegraph Co.*, 45 N. Y. 549 (6 Am. Rep. 140), the court said, the agent was placed in the office and in the control of the instruments to use them in transmitting messages for a compensation. If the agent performed the duty in a negligent manner, whereby the plaintiff was injured, the principal is clearly liable. Transactions of the most important character are daily carried on by means of telegraphic communication, and the confidence which the public is invited to, and does repose, in the care with which the proprietors of these lines conduct the business, is a source of large remuneration to such proprietors. They have a corresponding degree of responsibility, and must be held to the exercise of such care and caution as it is in their power to employ, in order to avoid being made the instruments of deception and fraud.

Another class of cases holds these companies are bound to the exercise of reasonable diligence and skill. *Washington & N. O. Telegraph Co. v. Hobson & Son*, 15 Gratt. 122. In this case the declaration did not allege negligence on the part of the company, and one instruction that the defendants were not responsible as common carriers, but only as general agents, for such gross negligence as in law amounts to fraud, was not authorized by the pleadings, and was properly refused.

In *Ellis v. The American Telegraph Co.*, 13 All. 226, the court said, it would be manifestly unreasonable and unjust to annex to a business of such a nature the liability of a common carrier, or to require that those engaged in it should assume the risk of loss and damage arising from causes, the operation of which they could neither prevent nor control. But, although they ought not to be

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held to such a standard of diligence, they are not exempt from all responsibility for a want of fidelity and care in the exercise of the employment which they undertake to carry on. There can be no doubt that, in the ordinary employments and occupations of life, men are bound to the use of due and reasonable care, and are liable for the consequences of carelessness or negligence in the conduct of their own business to those sustaining loss or damage thereby. We can see no reason why this rule is not applicable to the business of transmitting messages by telegraph. The court then comments on the efficacy of the regulation of the company requiring a message to be repeated, and hold it is a reasonable regulation.

In *Western Union Telegraph Co. v. Carew*, 15 Mich. 525, the court say, this is not a case which calls upon us for laying down the rules which must be held to govern as to the degree of skill, care and diligence to be required in the transmission of messages. But, doubtless, the use of good apparatus and instruments would be required, and reasonable skill and a high—perhaps the very highest—degree of care and diligence in their operation. And when an error has occurred in the transmission of a message, it may be found that they ought to be held *prima facie* guilty of negligence, the *onus* of proof resting upon them to show diligence, the means for doing this being peculiarly within their knowledge and power.

Other cases on this point might be cited: *Birney v. New York & Washington Telegraph Co.*, 18 Md. 341; *Breese et al. v. U. S. Telegraph Co.*, 45 Barb. 275.

All these cases hold, as do the following, that these companies may limit or modify their common-law liability by stipulations such as given in evidence in this case. *Wann v. Western Union Telegraph Co.*, 37 Mo. 472; *Camp v. Western Union Telegraph Co.*, 1 Metc. (Ky.) 164. This last case holds, when a message is not repeated, it will be regarded as sent at the risk of the sender, and the company will not be liable for damages resulting from a mistake not occasioned by negligence or the want of skill of the agents of the company.

An examination of the decided cases shows that the law applicable to telegraph companies is in an unsettled condition.

It must, however, be conceded that there is great harmony in the decisions that these companies can protect themselves from loss, by contract, and that such a regulation as the one



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under which appellees defended is a reasonable regulation, and amounts to a contract.

We are not entirely satisfied with the conclusions announced in some of these decisions.

Whether the paper furnished by the company, on which a message is written and signed by the sender, is a contract or not, depends on circumstances. In an analogous case in this court, *Adams Express Co. v. Haynes*, 42 Ill. 89, and in *Ill. C. R. R. Co. v. Frankenberg et al.*, 54 id. 88, it was held, the simple delivery of a receipt to the shipper is not conclusive upon the latter. Whether he had knowledge of its terms and assented to its restrictions is for the jury to determine as a question of fact upon evidence *abundant*, and all the circumstances attending the giving the receipt are admissible in evidence to enable the jury to decide that fact. The receipt given by the company, in this case, was declared on its face to be a contract, and was as full for such purpose, in the terms employed, as in the form in the case now before us. It was a question for the jury in that case, but in this case the court undertook to determine the question and decide the fact. We think this was error.

We do not see why the same rule, in this respect, should not apply to telegraph companies as applied to express companies and railroad companies. In regard to the latter, it is always held, whether or not such a regulation was brought to the notice of the shipper so as to fix knowledge upon him, to be a fact for the jury. *Brown v. Eastern Railroad Co.*, 11 Cush. 97. Slight evidence of acceptance, or assent to such regulation, would, no doubt, suffice, but it is for the jury to determine.

In the various and somewhat conflicting decisions of the courts on the questions presented, we are inclined to hold, admitting the paper signed by the plaintiffs was a contract, it did not, and could not, exonerate the company from the use of ordinary care and diligence, both as to their instruments and the care and skill of their operators.

The plaintiffs having proved the inaccuracy of the message, the defendants, to exonerate themselves, should have shown how the mistake occurred. This proof was not in the power of the plaintiffs, and was in the power of the defendants. In the absence of such proof, the jury would be authorized to presume a warrant of ordinary care on the part of the defendants.

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If the error was caused by atmospheric disturbances, or a momentary displacement of the wires, the defendants knew it, and ought to show it. In the absence of any proof on either part, the jury should be told the presumption was, a want of ordinary care on the part of the company. The court, however, refused to instruct the jury that the company was liable for gross negligence. It is the settled doctrine of this court that a railroad company cannot purchase exemption from gross negligence, or protect itself against such; that it would be against public policy so to contract. We see no reason why the rule should not be the same in regard to telegraph companies, for they are, like railroads, public institutions, having duties to perform to the public.

On general principles, we must hold the company, notwithstanding the special conditions relied upon, is responsible for mistakes happening by their own fault, such as defective instruments, or carelessness or unskillfulness of their operators, but not for mistakes occasioned by uncontrollable causes. *Sweetland v. Illinois and Mississippi Telegraph Co.*, 27 Iowa, 433 (1 Am. Rep. 185).

This company sought the patronage of the public in the exercise of their employment, and assured that public they would use at least ordinary care and diligence in their business, both as to their instruments and as to the skill of their operators. It cannot be claimed the contract in question was designed to relieve them from that, nor should it. They assure the public they have the most approved instruments and employ skillful operators, and they further assure the public that due care and diligence shall be exercised in conducting their business. If the conditions relied upon were designed to shield the company from consequences flowing from a want of skill of operators, or insufficiency of instruments, which would be gross negligence, such a condition would be contrary to public policy, and void.

The pretext for imposing the conditions in question is, "to guard against and correct, as much as possible, some of the errors arising from atmospheric and other causes appertaining to telegraphy," etc.

In these "other causes," it cannot be allowed to embrace defective instruments or unskillful operators, for the company are bound, by their obligations to the public, to provide the best—certainly, to provide operators of sufficient skill and intelligence, and instruments of the most approved construction. "Other causes" must mean only such causes as appertain specially to the business

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of telegraphy. Defective apparatus and unskillful operators appertain to business and public employments other than telegraphy. A railroad company cannot be excused on failing to employ competent engines, and servants to manage and conduct them and the trains to which they are attached. If a loss happens by reason of insufficient engines, or by the incompetency of their employees, they are liable.

We cannot hold that the printed conditions in evidence, in this case, protect this company from losses and damage occasioned by causes wholly within their own control. They must be confined to mistakes due to the infirmities of telegraphy, and which are unavoidable.

A point is made by appellees, that the negligence of appellants materially contributed to the loss incurred. This is a question of fact for the jury, and if it is established, they cannot recover.

But we fail to discover any evidence of contributory negligence on the part of the plaintiffs. And as to the receiver of the message, it was not his duty to telegraph back to ascertain the correctness of the message. The company was bound to send the message correctly in the first instance.

It is urged by appellees, in their comments on the instructions asked by plaintiffs below, that the first two were properly refused by the court, for the reason there was no evidence on which to base them.

There may have been no direct testimony on this point, but a jury is permitted to infer a fact from circumstances proved to them. It was in proof by John H. Wrenn, and not attempted to be contradicted or questioned, that so soon as he received a telegram from Chicago, which he did on the 30th of October, stating that an error had been committed, and ordering him to cover the extra nine hundred shares, he went immediately to the office of the company in New York and asked them to correct it. They told him the error had not occurred at their office, but in Chicago.

We think the attention of the jury was properly called by these instructions to this testimony, as it was not contradicted. It was in the power of the defendants to show the mistake did not occur at the Chicago office, by producing the original, which was in their possession. This they failed to do.

If the fact was that the error occurred in the Chicago office, then the plaintiff's right to recover is unquestionable, for there is no

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excuse for failing to start a message correctly. That fact would show a defective instrument or an unskillful operator, and for this the company would not be exonerated.

Another point is made by appellees, not undeserving notice, and that is, a want of knowledge on the part of the company of the importance or value of the message. It is a sufficient answer to this to say, that, be a message of great or trifling importance, the company is bound to transmit it literally—at least, according to some of the authorities, to use the highest degree of skill and care in their efforts so to do. But the dispatch disclosed the nature of the business as fully as the case demanded. A similar case is reported in 55 Penn. 262, *U. S. Telegraph Co. v. Wenger*. The dispatch was, "Buy fifty (50) Northwestern, fifty (50) Prairie Du Chien, limit forty-five (45)." It was held, this dispatch disclosed the nature of the business to which it related, and that a loss might occur if it was delayed. In this case a great loss has occurred, by incorrect transmission.

As to the point that appellees should have had an opportunity to replace the stock before Wrenn went into the market for that purpose, it is apparent, from Wrenn's testimony, the company had such opportunity, for he testifies he went to them, in New York, and requested them to correct the error. On their refusal, on the pretext that the error occurred at the Chicago office, he then purchased.

We have carefully read and considered all that has been written on the subject of the "Art of Telegraphy" which our libraries can furnish, and we are not satisfied with the grounds on which a majority of the decisions of respectable courts are placed.

In the first place, modern telegraphy is not now an infant art. It sprang into existence from the teeming brain of one, now no more, who had the boldness to attempt to render subservient to the wants of man the most subtle element of nature, and by its mysterious potency convey ideas, wants and wishes to the farthest limit of civilization, and with the speed of its kindred element. In its infancy, it scarcely ever failed to perform its office. Thirty years have witnessed vast improvements in the art—a higher knowledge of the subtle agent called into use—more finished instruments, and almost perfect skill in those who operate them; so that, setting aside atmospheric causes which have not yet been provided against, it may be asserted as an incontestible truth, that, given a line of

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wire properly established, the most perfect instruments, and skilled operators who exercise their skill with proper care, a message, started at Chicago for New York, is as sure to reach its destination exactly in the words and figures in which it was started, as the lightning is sure to strike the object which attracts it. Intelligent and skillful operators all admit this. There is no reason, the atmosphere being right, and all else right, why a message, correctly started, should not be correctly transmitted along the line to the end of the line, no matter how many hundred miles asunder may be the point of its departure and the point of its reception.

If this be so, then the efforts made by the courts to excuse those who undertake this business, should not be imitated or encouraged.

Again, it is said by enlightened courts, whose opinions we have quoted, that these forms furnished by the several companies, and they are all alike, when used by the sender of a message, and signed by him, becomes a contract between him and the company, by the terms of which he must abide.

The court told the jury, in so many words, this form signed by appellant was a contract between these parties by which their liability must be gauged. We have, in this opinion, said something on this point—that it was for the jury to determine whether it was, or not, a contract, knowingly executed by the party, with the intention to be bound by it.

We now desire to say, it is not a contract binding in law, for these reasons: Our statute makes it the duty of telegraph companies to transmit all messages committed to them for purposes of transmission, in the order in which they are received. They are bound by law to serve all who apply. They are public institutions, established by public law, and to whom is granted the right of eminent domain. Persons who unlawfully injure or molest, or destroy any of their lines, posts, pins, etc., on conviction, are deemed guilty of a misdemeanor and liable to fine or imprisonment in the penitentiary, or both. Failing to transmit a message, or suppressing a message, or making known its contents to any one other than the party to whom it is addressed, is deemed a misdemeanor, and punished by a fine not exceeding \$1,000.

By section 4 of the act, such companies have the power to purchase, receive and hold such real estate as may be necessary, etc., and may appoint such directors, officers and agents, and employ such servants, and make such prudential rules, regulations and by-

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laws, as may be necessary in the transaction of the business, not inconsistent with the laws of this State or of the United States. Laws of 1849, p. 188. This act imposes upon these companies duties to perform to the public, which they must perform *volens volens*. For their performance they are entitled to a reasonable compensation, the tariff of which they adjust themselves under the power granted by the 4th section. When this tariff is paid by the sender of a message, the duty of the company begins. This payment is the consideration for the performance of its duty in each particular case. On the assumption, then, that it is the duty of the company to transmit correctly the message for which they have received compensation, where, in law, arises any obligation on the part of the sender to repeat the message?

The fact is conceded that a telegraph company is the servant of the public, and bound to act whenever called upon, their charges being paid or tendered. They are, in that respect, like common carriers, the law imposing upon them a duty which they are bound to discharge. The extent of their liability is, to transmit correctly the messages as delivered. This is conceded. But it is decided by all the courts that a common carrier can, by contract, restrict this liability. The argument is, that the condition for repeating is such a restriction, and being in writing and signed by the sender, is, to all intents and purposes, binding upon him as a contract.

The question at once arises, where is the consideration for this contract? It does not move from the company; on the contrary, they demand of the sender of the message fifty per cent in addition for repeating—for assuring the faithfulness of their own conduct. We fail to perceive any consideration whatever on which to base this so-called contract. It is not a contract of any legal or binding force. This court said, in *Illinois Central Railroad Co. v. Morrison et al.*, 19 Ill. 136, that a common carrier might restrict his common-law liability by a contract fairly made with the shipper. In that case, the contract was special and under seal, and for which the railroad company paid a valuable consideration by reduction of the freight charges. That was a binding contract for value. The one in question is not so, and does not possess one of the essential elements of a valid and binding contract—namely, a consideration. It is a sham and a delusion, and an imposition upon the public who are compelled to resort to this agency in the transaction of their business.

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If it be a contract, the sender entering into it was under a species of moral duress. His necessities compelled him to resort to the telegraph as the only means through which he could speedily transact the business in hand, and was compelled to submit to such conditions as the company, in their corporate greed, might impose, and sign such a paper as the company might present. "Prudential rules and regulations," such as the company is authorized by statute to establish, cannot be understood to embrace such regulations as shall deprive a party of the use of their instrumentality, save by coming under most onerous and unjust conditions.

But it is said, a special agreement might have been made for insurance, in writing. To do this, the amount of risk must be specified on the contract, and paid at the time of sending the message; and as there is but one person in the world, a superintendent, authorized to make a contract of insurance, he must be hunted up and the terms negotiated—all which requires time—and a favorable opportunity to the sender be irretrievably lost. At Chicago, or other large cities, where a superintendent is supposed to be, there might not be much loss, but we are declaring the law for the whole State, and it is well known that at subordinate, though important stations, on telegraph lines, superintendents are not to be found; this provision is to such perfectly valueless.

As a party, repeating a message, and paying fifty per cent additional therefor, cannot recover of the company to the extent of his loss, we are free to say such a contract, forced, as we have shown it is, upon the sender, is, in our opinion, unjust, unconscionable, without consideration, and utterly void.

The remaining question is as to the damages. As this case must be tried again, it is necessary some rule should be prescribed by which the damages are to be estimated. As a general principle, every person and corporation ought to make good all damages occasioned by his or their default. But it is not always easy, in cases of this kind, to state a general rule. It has been said, and very properly, that the great difficulty in such cases is, to distinguish between the right to recover and the amount to be recovered—the line dividing these two branches of the law sometimes vanish entirely. The best reflection we have been able to bestow on this branch of the case prompts us to say the rule adopted in *U. S. Telegraph Co. v. Wenger, supra*, in a similar case, is a reasonable rule.

The message, in that case, ordered a purchase of stock, which advanced in price between the time the message should have arrived and the time it was purchased under another order. The advance in price was held to be the measure of damages.

That message, as this, disclosed to the agent of the telegraph company the nature of the business to which it related—in this case, to sell a certain number of shares of stock.

If appellants were compelled to, and did, purchase nine hundred shares of this stock to replace the stock so sold by reason of the carelessness of this company, and that, in the interval between the selling 1,000 shares and the repurchase by Wreen of the 900 shares to replace the extra number of shares sold, that stock had advanced in price, this advance should be the measure of damages. It is reasonable to suppose this is what both parties had in view when the message was committed to the care of appellees.

In looking at these conditions prescribed by telegraph companies, this one in particular—but they do not differ, essentially, from those of other like companies—we are forcibly impressed with the belief that they are designed to relieve themselves from all responsibility. Content to receive the money of the sender, they design to escape all responsibility. Such conditions are unreasonable, and ought not to receive the sanction of any court.

We have said, and we repeat, that there is no reason, apart from atmospheric causes, why a message should not be transmitted precisely as received. The art is reduced to a certainty. That courts should not be swift to exempt these companies from liability, is a dictate of public policy. To such perfection has the art reached, that, in the last thirty years in which electric telegraphs have been operated, we have been unable to find, among the reported cases in this country and in England, more than fifty instituted against those companies for losses occasioned by their negligence. The messages sent by them in this time have amounted to millions. Under these circumstances, their bold claim to exemption should meet with no favor from the courts. The doctrine, to benefit the public, must be, as we have endeavored to establish, that a mistake in transmission is *prima facie* evidence of negligence, and the burden is on the company to show the contrary.

If these companies rely upon contracts as restricting their liability, it is incumbent on them to show a valid contract freely entered into by the sender of the message, and for a valuable con-



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consideration paid by the company or acknowledged by the sender. But even such contract will not relieve the company from gross negligence.

On the most mature reflection, aided by all the light shed upon this subject, we are at a loss to understand upon what principle telegraph companies should be accorded immunity for their torts, or be relieved from the liabilities voluntarily assumed by them. If they desire to restrict their liability, it must be done by a contract fairly and knowingly entered into, and for a valuable consideration.

Holding these views, the judgment of the court below must be reversed, and the cause remanded for further proceedings consistent with this opinion.

*Judgment reversed.*

NOTE. — See *True v. International Telegraph Co.*, 11 Am. Rep. 156 (60 Me. 9), and cases cited in the note thereto. — REP.

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BENTLEY, appellant, v. WELLS.

(61 ILL. 50.)

*Bankruptcy — mortgage of personal property, how affected by.*

A mortgage on personal property to secure a loan was given in September, and in December the mortgagor filed his petition in bankruptcy. When the mortgage became due the mortgagee took possession of the property. In an action of replevin brought by the assignee in bankruptcy, *held*, (1) that the assignee took only the equity of redemption, by virtue of the bankruptcy proceedings, and that the mortgagee had the right to take possession of the property; (2) that the mortgagee could hold the property although he knew, at the date of the mortgage, that the mortgagor was insolvent, there being no other evidence that he had reasonable cause to believe that the mortgagor intended to defraud the bankrupt act.

ACTION brought by Charles F. Bentley against Samuel Wells, to recover possession of personal property. The opinion states the case.

*O. F. Woodruff and Eustace, Barge & Dixon*, for appellant.

*O. J. Johnson*, for appellee.

LAWRENCE, C. J. We held, in *Cole v. Duncan*, 58 Ill. 176, that a petition in bankruptcy by a mortgagor, and a decree declaring him a bankrupt, would not prevent the State courts from taking jurisdiction of a bill to foreclose a mortgage. A similar question is presented by this record. Here, the mortgagee of personal property took possession, under his mortgage, of the mortgaged property, and the assignee in bankruptcy brought against him this action of replevin. The mortgage was made by one Lincoln, September 28, 1868, and on the 18th of December thereafter, Lincoln filed his petition in bankruptcy. The mortgage was given to secure the payment of money loaned.

The 14th section of the bankrupt law, after providing that the judge or register shall, by an instrument under his hand, assign and convey to the assignee all the property of the bankrupt, excepting certain property therein exempted, reads as follows: "*And provided, further, That no mortgage of any vessel or of any other goods or chattels made as a security for any debt or debts in good faith and for present consideration, and otherwise valid and duly recorded pursuant to any statute of the United States or any State, shall be invalidated or affected hereby.*"

This language is certainly sufficiently explicit. The mortgage was not "invalidated or affected" by the subsequent proceedings in bankruptcy, and when the debt secured by it became due, the mortgagee had the same right to take possession of the mortgaged property that he would have had to take possession of his own if he had had any temporarily in the custody of the mortgagor at the time of filing the petition. The assignee in bankruptcy took only the equity of redemption. The lien of the mortgagee remained unimpaired, as did also his right to assert it in any legal manner.

We have not access to the cases cited in *Bump on Bankruptcy*, from the Bankrupt Register, but if any of them hold a different doctrine from this, we should decline to follow them.

It is further urged by the appellant that the mortgage was invalid because the mortgagor was insolvent when he made it, and this fact was known to the mortgagee. But to render the mortgage void, insolvency alone, and the knowledge of it on the part of the mortgagee, are not sufficient. It is also necessary, under the 35th section of the act, that the mortgage should be made "in fraud of the provisions of this act," and that the mortgagee should have reasonable cause to believe that such was the object of the mortgagor.

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The first clause of the section relates to transfers of property made with a view to give a preference between creditors, and "in fraud of the law," and avoids the transfer, if made within four months before filing the petition. The second clause avoids all transfers, including sales made six months previous to the petition, in contemplation of insolvency, with a view to prevent the bankrupt's property from coming to the assignee, or to defeat in any way the object of the act. This clause, however, like the other, requires, in order to avoid the transfer, not only the fraudulent intent on the part of the grantor, but that the grantee should have reasonable cause to believe in the existence of such intent. This is the express provision of both clauses of the section, and the only reasonable construction it can receive is that the grantee or mortgagee should have reasonable cause to believe that the grantor or mortgagor intends to avail himself of the bankrupt act, and that the transfer or mortgage is made for the purpose of preventing the distribution of his property required by that act, or at least that such is one of his purposes.

It would be very unjust, and would greatly embarrass the operations of trade, if it should become the settled construction of this law that every sale of property, even for a full consideration, and in the utmost good faith, or every mortgage in equal good faith, must be held void because the vendor or mortgagor is known at the time to be in straightened circumstances, and within four months thereafter petitions to be declared a bankrupt. This cannot have been intended by the framers of the bankrupt act, and the language of the act justifies no such construction. A sale or mortgage, otherwise unobjectionable, is not avoided by a subsequent bankruptcy, unless made in fraud of the act, or, in other words, with a view of seeking the benefits of the act, and at the same time defeating its requirements, and the vendee or mortgagee must have reasonable grounds for believing in the existence of such fraudulent intent. This fraudulent intent is not shown merely by the subsequent bankruptcy, and the fact that the bankrupt was, at the time of the sale or mortgage, unable to pay his debts, and that the vendee or mortgagee had good reason to know that fact. That is all that is shown in this case.

If the framers of the law had intended this proof alone to be sufficient — if the fraudulent intent is to be inferred, as a legal presumption from the mere proof of insolvency, and a reasonable

knowledge thereof— why did they require, in addition to these facts, the existence of a fraudulent intent, and that the mortgagee should have reasonable cause to believe in its existence? Why speak of fraudulent intent at all? No reason can be given. As they required both facts to be proved before avoiding the transfer, it is impossible for us to believe they intended one fact to be inferred as a legal consequence from the existence of the other. When a statute provides that a certain result shall follow from the proof of two defined facts, the courts have no right to say the result shall follow merely from the proof of one. This is making, not construing, a statute.

The same construction must be given, in this respect, to the second clause of the section as to the first. That the act should declare void a sale, even for full consideration, if made to prevent the property or its equivalent from coming to the assignee in bankruptcy, we can well understand. Such a sale would be in fraud of creditors. But we cannot hold that the purchaser of property in good faith is liable to have it taken from him by an assignee in bankruptcy merely because he had good reason to know, at the time of the purchase, that the vendor was unable to pay his debts, and because the vendor does, within six months, file a petition in bankruptcy. Men may be practically insolvent, that is, unable, with the property then owned by them, to pay their debts, and suspected to be so by the community, and yet continue in business, with no expectation of going through bankruptcy, but laboring on the contrary to retrieve their circumstances, and often succeeding in the effort. Yet, the construction contended for would practically condemn every such man to bankruptcy, since no purchaser from him could be secure of his title, and no creditor could take a mortgage from him and extend the time of payment of his debt with any confidence that his security would not be taken away. The injustice and impolicy of such a construction are very apparent.

We find no error in this record.

*Judgment affirmed.*

## ADAMS EXPRESS COMPANY, appellant, v. STETTANERS.

(61 Ill. 184.)

*Common carrier — Express company — limitation of liability*

Goods to the value of over \$400 were shipped by express, the bill of lading given by company stipulating that it should not be liable in case of loss beyond \$50. The goods were lost; and in an action to recover therefor, the company claimed that it was liable only to the extent of \$50. *Held*, that the measure of liability was the value of the goods. Such a limitation in a bill of lading does not excuse the carrier from the exercise of ordinary care, even when assented to by the shipper; and where the goods fail to arrive at their destination and the carrier does not show the manner of their loss, the presumption arises of want of ordinary care.

The assent of a shipper to the limitations in a bill of lading is not necessarily to be presumed from the acceptance of the bill. (*See note, p. 60.*)

ACTION by Louis Stettaners and others against the Adams Express Company to recover the value of goods shipped by defendant as carrier of goods. The opinion states the case.

*E. G. Asay and Hawes & Lawrence*, for appellant.

*Rosenthal & Pence*, for appellee.

LAWRENCE, C. J. This was an action brought by the appellee against the Adams Express Company to recover the value of certain merchandise shipped from New York to Chicago. The case was submitted to the court upon the following agreement as to the facts, with liberty to both parties to introduce other testimony:

"It is hereby stipulated and agreed that the merchandise in controversy was ordered by plaintiffs, merchants in Chicago, Illinois, of Kutter, Luckemeyer & Co., merchants in the city of New York, in the usual course of trade, and that plaintiffs ordered said New York merchants to ship said merchandise to them at Chicago by the defendant, which is an express company and common carrier. The value of the goods at the time of loss, September 13th, A. D. 1870, was \$415.50. The consignors, said New York merchants, shipped said goods by defendant's company, and received from the defendant the paper hereto annexed. The goods were not delivered

to plaintiffs, but were lost in transit. No statement of the value of the goods was made at time of shipment. The same consignors, a short time before this shipment, shipped a package by same company, of greater value than \$50, to other parties (not plaintiffs). Those goods were also lost. A receipt similar to one above was given to consignors at time of shipment. The consignors claimed the full value of goods lost, which was at first refused on the ground that company claimed not to be liable for more than \$50, but was finally paid by the company. At the time of payment, which was before the goods in controversy were shipped, the company informed the consignors that in all shipments thereafter, if they wished to hold the company liable for more than \$50, they must, at time of shipment, state the real value of package shipped; that plaintiffs did not know, at the time of the shipment to them, of the foregoing information by defendant to consignors. Both parties may introduce other legal testimony on hearing."

The bill of lading, which was introduced in connection with the foregoing agreement, contains various stipulations printed underneath the receipt for the goods, one of which is that the company shall not be liable beyond the sum of \$50, at which the goods forwarded are to be valued, unless otherwise therein expressed, or unless specially insured, and so specified in the receipt.

The defendant claimed it was liable under this provision only to a judgment of \$50. The court held otherwise, and gave judgment for the value of the goods.

This court has several times held that provisions, like the one under consideration, annexed to the receipt in a bill of lading, do not release the carrier from his common-law liability unless the assent of the shipper to such limitation is shown, and that such assent is not necessarily to be presumed from the acceptance of the bill of lading. *Adams Express Co. v. Haynes*, 42 Ill. 90; *Western Transportation Co. v. Newhall*, 24 id. 466; *Buckland v. Adams Express Co.*, 97 Mass. 125. It is urged that the evidence in this case shows what must be considered as an assent. It is not necessary to discuss that question, as the judgment must be affirmed upon another ground.

Even if it should be conceded that the shipper, in this case, must be considered as having assented to the terms of the bill of lading, we cannot hold the carrier excused from the exercise of reasonable and ordinary care. Courts have often had occasion to express their

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regret that common carriers have been permitted, even by contract, to discharge themselves from the obligations imposed by the salutary rules of the common law. Practical monopolies as they often are, under the modern system of railway transportation, they seek to impose their own terms upon the public and compel the shipper to accept such bills of lading as they may choose to issue, or not to ship at all. The exemption relied upon by the defendant in the present case furnishes an illustration. It is very unreasonable in the carrier to say that it will, in no event, be liable beyond the sum of \$50 in the absence of a special contract, though it may have received much more than that sum merely in the way of freight. If common carriers desired to deal fairly with the public, it would be very easy for them to require the shipper to specify the value of the merchandise and insert the amount in the receipt, making their charges in proportion to their liability. If the shipper should falsely state the value he could not complain at being held to his own valuation.

In order to prevent the carrier from releasing himself, by contract, from all liability, courts have laid down the rule above stated, that he cannot, even by contract, exempt himself from the exercise of reasonable care. *Illinois Central Railroad Co. v. Morrison*, 19 Ill. 136; *Adams Express Co. v. Haynes*, 42 id. 90; *N. J. Steam Nav. Co. v. Merchants' Bank*, 6 How. (U. S.) 382; *York Co. v. Central R. R. Co.*, 3 Wall. 113; *Farnham v. Camden & Amboy Railroad Co.*, 55 Penn. St. 58.

They have also established the further principle that, where the goods fail to arrive at their destination and the carrier does not show the manner of their loss, the presumption arises against him of want of ordinary care. *Adams Express Co. v. Hagnes*, 42 Ill. 89; *American Express Co. v. Sands*, 55 Penn. St. 140; *Davidson v. Graham*, 2 Ohio St. 131.

This rule is reasonable and just. The carrier alone has it in his power to show what has become of the goods, or why they were not duly delivered. He has the means of tracing them from the moment of their shipment. The shipper has not. He can only show that he delivered them safely to the carrier, and unless the rule in question is applied, the shipper would practically have no remedy, even though his goods had been plundered by the very servants of the carrier. It would very rarely be in his power to make the necessary proof.

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In the case before us, the defendant made no proof whatever, showing why the goods had not arrived. The presumption then must be indulged that there was the absence of reasonable care, and in that event the defendant cannot excuse itself, even by contract.

*Judgment affirmed.*

NOTE.—In *Oppenheimer v. The United States Express Co.*, 9 Alb. Law J. 187, the same court held (1874) that where a clause in the receipt given by an express company restricts the liability of the company to \$50 unless the value of the package is stated in the receipt, such sum is the limit of recovery for a single package in case of loss where no value is stated. — REP.

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STEELE, appellant, v. BUCK.

(61 Ill. 343.)

*Bond—performance of condition rendered impossible.*

A and B chartered a vessel and gave a bond, with C as surety, conditioned for her return at a certain time in good order. The vessel was destroyed in a gale by the "act of God." *Held*, that the obligors were not released from liability on the bond.

ACTION by E. A. Buck against Charles Vogell, William B. Crandall and George Steele on a bond. The opinion states the case.

*Miller, Van Arman, Frost & Lewis*, for appellants.

*Rae & Mitchell*, for appellee.

SCOTT, J. This was an action of debt, brought by the appellee on a bond given by Charles Vogell and William B. Crandall, as principals, and the appellant, Steele, as surety, to secure the performance of the covenants of a charter-party bearing even date with the bond. The charter-party was in the usual form, and, by its terms, Vogell and Crandall were to have the exclusive use and possession of the propeller "Equator," to man and run her during the season of 1869, to be employed in the business of commerce



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and navigation upon the lakes and navigable waters connecting the same; and for the use of the vessel they were to pay a stipulated price, and in addition thereto, it contained an express covenant that they would deliver the propeller at the port of Chicago at the close of the navigation season for that year, in as good and sound condition as she then was, reasonable use and wear excepted.

Two specific breaches were assigned on the covenants contained in the bond: first, that Vogell and Crandall did not pay the stipulated sums for the use of the vessel; and, second, that they did not return it at the close of the season of navigation of the year 1869, as by the terms of the charter-party they were bound to do.

It is not claimed that there is any thing due for the use of the vessel, and the main question in the case arises upon the construction and legal effect of the covenant contained in express terms in the bond as declared on in the second breach, as well as in the charter-party, "to return and give up the said propeller "Equator" to the said E. A. Buck, his executors, administrators, and assigns, or his or their order, at the port of Chicago, at the close of the said season of the year 1869, in as tight, staunch and good condition as she now is, reasonable wear and tear excepted."

Whatever would discharge the liability of Vogell and Crandall would of course operate as an acquittance to the appellant Steele, who was only their surety on the bond.

Evidence was tendered on the trial in the court below to prove that, before suit was brought, and while Vogell and Crandall were in possession of the propeller "Equator," and while they were using and employing her under the charter-party on the waters of Lake Michigan, to wit: on the 18th of November, 1869, and before any breach of the condition of the bond, the propeller was overtaken by a gale, and was, by force and violence of the wind and waves, and without any fault or negligence on the part of Vogell and Crandall, or those navigating her, broken to pieces and sunk in the waters of the lake, and become and was utterly lost and destroyed.

The court, on objection being made, rejected the evidence.

This ruling of the court raises the principal question in the case: whether Vogell and Crandall were excused from the performance of the covenant in the charter-party, to secure which the bond had been executed that required them to deliver the propeller to the appellee at the port of Chicago, in consequence of its destruc-

tion by the perils of the sea, or by what is commonly called "the act of God."

It is insisted by the counsel for the appellants that, when the performance of a contract has become impossible by the act of God, the party is relieved from the obligation to perform, and that this rule is especially applicable to the liability of a bailee of personal property, even though it arises upon an express contract, and is especially applicable to the covenant to deliver, or surrender up, the property of another received by the obligor or bailee, even though such obligor be a common carrier, as to whom the law applies the strictest rule of liability, and that the covenant for the breach of which this action is brought is of this character.

If no distinction can properly be taken between obligations created by law, arising out of implied contracts, and where the contract itself expressly creates the duty or charge, then the rule of law insisted upon might be maintained, at least to a limited extent.

The general doctrine is, as laid down in *Paradine v. Jaine*, Aleyn, 27, cited in 3 Bos. & Pul. 420: "Where a party, by his own contract, creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his own contract." And as said by Mr. Justice CHAMBER, in the latter case: "If a party enter into an absolute contract, without any qualifications or exceptions, and receives from the party, with whom he contracts, the consideration for such engagement, he must abide by the contract, and either do the act or pay damages, his liability arising from his own direct and positive undertaking." To the same effect are the following cases: *Bacon et al. v. Cobb et al.*, 45 Ill. 47; *Mill Dam Foundry v. Hovey*, 21 Pick. 441; *Demott v. Jones*, 2 Wall. 1; *School Trustees v. Bennett*, 3 Dutch. 518; *Bullock v. Dommitt*, 6 Term, 650; *Brennock v. Pritchard*, id. 750.

The principle that lies at the foundation of the series of authorities, English and American, on this question, is, that the party must perform his contract, and if loss occurs by inevitable accident, the law will let it rest upon the party who has contracted that he will bear it.

The rule is a just one, and has its foundation in reason, for, if he did not intend to bear the loss, it is natural to presume that he

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would have stipulated against it. It tends to promote justice by regarding the sanctity of contracts. In some instances it may work a hardship ; so do all general rules ; but they are none the less indispensable in the affairs of life for that reason.

There have been exceptions allowed in obligations taken in judicial proceedings, such as recognizances and replevin bonds. In recognizances, if the person die, the liability of the surety is discharged. So, too, in regard to an obligation to deliver a living animal. If it die, the obligor is excused from performance. The same principle prevails where a party agrees to render personal service, to work for a stipulated period, or to do a certain class of work that cannot be performed by another, and dies before the contract is completed, the obligation is discharged. *Schwartz v. Saunders*, 46 Ill. 22.

But where the party may perform the contract, and has not provided for the dispensation, the law will not do it for him. Where a tenant, for example, has covenanted to repair, and the buildings are destroyed by fire, or lightning, or the act of God, as it is termed, the tenant must rebuild upon the demised premises. The reason is obvious. He has contracted expressly to do it, and it is possible for him to restore that which has been destroyed, and if he does not do it, he must respond in damages. By rebuilding, it will answer the covenant to repair, and he cannot avoid his obligation by reason of the destruction of the building, even without fault on his part. It is the contract, and he must perform it. It is possible for him to comply, and the law will not excuse performance.

A distinction has been taken between implied contracts, or such as the law raises, and express contracts. The performance of duties implied by law may be excused when performance becomes impossible by inevitable accident, but a duty or charge created by the express terms of an agreement may not be so excused.

In *Hovey's case*, 21 Pick. 47, Mr. Chief Justice SHAW says : "The distinction is now well settled between an obligation or duty imposed by law, and that created by covenant or act of the party. When the law creates a duty, and the party is disabled from performing it, without any fault of his own, the law will excuse him, as in waste to a tenant if the same be destroyed by a tempest or enemies, the lessee will be excused ; but where the party, by his own contract, creates a duty or charge upon himself, he is bound to make it good, notwithstanding any accident by inevitable neces-

sity, because he might have provided against it by his contract,' and cites 2 Wm. Saund. 422 a, note 2.

The reason given for the rule is, that when, if an event happen which will occasion loss to one or the other contracting parties, yet the party who contracts that the event shall not happen, although he may be unable to perform his contract by reason of the act of God, he shall stand the risk and make good the loss. The party contracting assumes the responsibility for the consequences that may follow, if, for any cause whatever, he may be unable to perform his contract. He is an insurer to the extent of making good the loss.

The covenant in the bond declared on is of this character. It is absolute in its terms. It is a positive undertaking by Vogell and Crandall to restore the propeller at the end of the season for which it was hired, notwithstanding it might be destroyed by the perils of the sea. The charter-party itself provides for the return of the propeller, and if this was all the contract between the parties, there might be some reason for insisting that it creates no higher obligation than the law imposes. The charterers in this instance had given the bond, which is the subject of this action, with security for the performance of this very covenant in the charter-party.

We are at a loss to understand what is wanting to make this an express covenant to re-deliver the propeller at the end of the navigation season, even to making the charterers insurers against the perils of the sea. Whence the necessity for the bond and security, if it was not the express agreement and intention to charge the charterers, if the propeller was lost by the perils of navigation? If it were simply that the charterers should restore the propeller, in case it were not lost, the charter-party imposed that obligation, and there could be no necessity for taking the bond. Only two covenants contained in the charter-party are specifically named in the bond: first, the payment of the agreed price for the use; and, second, for the return of the propeller. The payment of the hire was a minor consideration, and doubtless the main covenant in the charter-party that the bond was given to secure, was the covenant to return the propeller. No other construction can reasonably be given to it, than that it was an absolute undertaking on the part of the appellant Steele, that the charterers should return the propeller at the end of the navigation season, notwithstanding the perils of the sea. His obligation was absolute, that they should perform that covenant in the charter-party.

The case of *Madeiros v. Hill*, 8 Bing. 230, cited by counsel, is not in conflict with the views we have expressed. In that case it was held that it was no defense to an action on a charter-party for not sailing on the voyage toward the port agreed upon, that the port was in a state of blockade, if the defendant knew the condition of the port at the time of entering into the charter-party. The rule in *Paradine v. Jaine* was applied.

*Taylor v. Caldwell*, 113 Eng. C. L. 836, does not seem to us to be exactly in point. The contract was for the use of a music hall for certain days named, in the future. Before either party had entered upon the execution of the contract, the hall was destroyed by fire. It was held, that the parties must have contracted with reference to the continued existence of the thing which constituted the foundation of what was to be done. The hall having ceased to exist, without fault of either party, it was held that both parties were discharged from the performance of their respective obligations. Mr. Justice BLACKBURN, in delivering the judgment of the court, said: "There seems to be no doubt that, where there is a positive contract to do a thing, not in itself unlawful, the contractor must perform it or pay damages for not doing it, although, in consequence of unforeseen accidents, the performance of his contract has become unexpectedly burdensome, or even impossible;" but takes the case out of the general rule on the ground that the parties in that case must have contracted with reference to the continued existence of the thing which formed the basis of the contract, on the principle of the civil law that such an exception is implied in every obligation of that character.

*The brig Casco*, Davies' R. 184, illustrates no principle involved in the decision of this case.

*Ames v. Belden*, 17 Barb. 513, may be distinguished from the case at bar. There the action was on the charter-party containing equivalent words to those of the charter-party in this case, and it was held that a covenant to insure should never be implied; a covenant of that nature not appertaining to contracts of bailment.

Here the action is not on the charter-party, but upon a bond expressly conditioned for the performance of the covenants of the charter-party.

The case of *Bacon et al. v. Cobb et al.*, 45 Ill. 47, is an authority against the position assumed by the appellant.

The court cites the case of *School Trustees v. Bennett*, 3 Dutch.

513, which announces the well-recognized principle that, where one of two innocent persons must sustain a loss, the law casts the burden upon the party who agreed to sustain it, or rather leaves it where the parties, by their agreement, placed it.

Such is the character of this transaction. Vogell and Crandall, by the terms of the charter-party, agreed to return the propeller at the end of the navigation season, and the appellant Steele, as their surety, expressly agreed, by the terms of the bond, which is the subject of this action, that they should perform that covenant in the charter-party. The parties did not provide, by their contract, for any excuse in case of the destruction of the propeller by reason of any accident arising from inevitable necessity, and the law will not supply the omission for the contracting party. Having failed to make provision for their protection in case of disaster, the parties cannot now set up, as an excuse for the non-compliance with the express terms of the bond, that the propeller was destroyed by the perils of the sea, and the evidence as to its destruction was properly rejected.

The mere fact that the vessel was insured for the benefit of the appellee would constitute no defense to the action. Had the appellant offered to prove that the appellee had received the insurance money, it is conceded that no valid objection could have been interposed. He could have but one satisfaction for the loss of his property. This they did not offer to do.

The court ruled correctly in excluding the evidence tendered, and the judgment must be affirmed.

*Judgment affirmed.*

SHELDON, J., delivered a dissenting opinion.

**BRESSLER, plaintiff in error, v. KENT.**

(61 Ill. 426.)

*Married woman — conveyance of real estate — when void.*

The statute of Illinois provided that it should be lawful for the husband and wife to execute a deed of her real estate. A wife, without the concurrence of her husband, executed a separate deed of trust of her real estate to secure payment of a promissory note given by herself and husband for his debt. *Held*, that the deed was void. It is only in the precise mode prescribed by statute that a married woman can make a valid conveyance of land. *Young and Wife v. Graff*, 28 Ill. 20, overruled.

ACTION by Frederick H. Kent against Peter Bressler and another. The opinion states the case.

*C. J. Johnson*, for plaintiffs in error.

*Wilkinson, Sacket & Bean*, for defendant in error.

SHELDON, J. Sabrina Bressler, a married woman, executed, without the concurrence of her husband, as a party, her separate deed of trust of certain real estate owned by her, to secure the payment of a promissory note given by herself and husband for a debt of the latter, and the question presented by this record is, did she thereby charge such real estate with the payment of the debt, and will a court of equity, by a proceeding against the property, subject it to the payment of such charge?

By the common law, the only mode in which a married woman had power to transfer her title or interest in real estate, was by levying a fine or suffering a common recovery.

Our statute of conveyances has provided that, when any husband and wife residing in this State shall wish to convey the real estate of the wife, it shall and may be lawful for the husband and wife to execute any deed, etc., for the conveying of such land, and that such deed (after the solemnities of examination and acknowledgment) shall be as effectual in law as if executed by such woman while sole and unmarried.

It is only in the precise mode prescribed by the statute that a

married woman can make a valid conveyance of her lands. That mode was not pursued in the present case, as the husband did not join in the execution of the deed, and the deed of trust did not create a valid lien upon the land. *Cole v. Van Riper*, 44 Ill. 58; *Moulton et ux. v. Hurd*, 20 id. 137.

Such is the rule at law, and the one that must govern in this case, unless the rule in equity shall be held to apply, that the separate estate of a married woman will, in equity, be held liable for all the debts, charges, incumbrances and other engagements which she does expressly, or by implication, charge thereon. 2 Story's Eq. Jur., § 1399.

There is a distinction in this respect, in equity, between the separate property of a married woman and her other property. As to the former, she is treated as a *feme sole*, having the general power of disposing of it; but as to the latter, all the legal disabilities of a *feme covert* attach upon her. Id., § 1397.

It is to be considered, then, whether the estate in question was the *separate estate* of the wife, in the sense of that term, as recognized and acted upon by a court of chancery, and subject to be disposed of by herself alone. Separate estates in married women, which courts of equity recognize their right to dispose of as *femes sole*, are strictly equitable estates. They are always created by deed, devise or marriage settlement, and the character of separate estate is impressed upon them by the terms of the instrument creating them.

It was formerly deemed absolutely necessary that the property should be vested in trustees, and, in strict propriety, that should always be done, though it has been established that the intervention of trustees is not indispensable. 2 Story's Eq., § 1380.

It is not because the entire interest in an estate is vested in a *feme covert* that renders it of the description of a separate estate in her. A *separate estate* in a *feme covert* only exists in such property, whether it be real or personal, as is settled upon her for her separate use, without any control over it on the part of her husband. It is not all the estate, either in lands or chattels, belonging to a *feme covert*, nor is it her right of dower in the real estate of her husband. *Albany Fire Ins. Co. v. Bay*, 4 N. Y. 9. The facts in this case disclose no such separate estate in Mrs. Bressler.

It is claimed that since the passage of the act of February 21, 1861, entitled "an act to protect married women in their separate



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property," any real estate which a married woman owns in her own right will, in equity, be regarded as her separate property, and subject to all the incidents of such property, as before recognized in a court of chancery.

The act provides, "that all the property, both real and personal, belonging to any married woman, as her sole and separate property, or which any woman hereafter married owns at the time of her marriage, or which any married woman, during coverture, acquires in good faith from any person other than her husband, by descent, devise, or otherwise, together with all the rents, issues, increase and profits thereof, shall, notwithstanding her marriage, be and remain, during coverture, her sole and separate property, under her sole control, and be held, owned, possessed and enjoyed by her the same as though she was sole and unmarried, and shall not be subject to the disposal, control or interference of her husband, and shall be exempt from execution or attachment for the debts of her husband."

The estate created by the act is as fully for the separate use of the wife as it could have been made by virtue of the provisions of any instrument in writing. The rule in equity, that a *feme covert*, acting with respect to her separate property, is competent to act in all respects as if she were sole, must be understood only of personal property, and of the rents and profits of real estate during her life.

The wife's own reversion in lands, when she owned them at the time of the marriage, was a legal estate descendible to her heirs, to which courts of equity did not apply the doctrine stated. In reference to such an estate, she had only the disposing capacity which the common law or some enabling statute allowed to her.

So, if an estate is, during coverture, given to a married woman and her heirs, for her separate use, without more, she cannot, in equity, dispose of the fee from her heirs, but she must dispose of it, if at all, in the manner prescribed by law, as in England, by fine or recovery, and here, by the solemn conveyance required by the statute. But if, in such a case, a clause is expressly super-added, that she shall have power to dispose of the estate so given to her during her coverture, then courts of equity will treat such a power as enabling her effectually to dispose of the estate.

Thus the limitation of real estate to the wife in fee to her sole and separate use did not give her, in equity, the power to dispose

of the fee from her heirs; to do so, an express power of disposition must have been given to her by the instrument.

These principles appear to be supported by the following authorities: 2 Story's Eq. Jur., §§ 1391-2, 1397; 2 Roper on Husb. & Wife, 182; Clancy on Married Women, 287, and cases cited in notes to these authorities; *Yale v. Dederer*, 18 N. Y. 265; *Same v. Same*, 22 id. 450; *Newlin v. Freeman*, 4 Ired. Eq. 312.

The act referred to gives no power to dispose of the estate. *Cole v. Van Riper*, 44 Ill. 58. It only reserves it to the sole and separate use of the wife. Hence, even under the full application of this doctrine of equity, the wife would have no sole disposing power over the fee of her real estate.

But a married woman's separate estate, under this act, is a strictly legal separate estate, and we see no reason why she should not hold it subject to the ordinary disabilities resulting from her coverture; why the statute should not have full operation upon it, and the mode therein prescribed be the only one whereby a married woman can dispose of her real estate.

What has been said is entirely aside from the question how far a married woman, as a necessary incident to the enjoyment of her separate property, may contract as to matters pertaining to the enjoyment of its use, and is to be taken without any bearing upon such a question.

The case of *Young and Wife v. Graff*, 28 Ill. 20, seems to afford a warrant for the decree of the court below. Upon fuller consideration, we think the doctrine of equity, as to a married woman's disposing power over her separate property, was carried further in that case than the authorities seem to warrant.

We regard the deed of trust in this case as invalid, and that the decree of the court below, for the sale of the premises purporting to be conveyed by it, was erroneous.

The decree must be reversed, and the cause remanded for further proceedings in conformity with this opinion.

*Decree reversed.*

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Good v. Fogg.

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GOOD, plaintiff in error, v. FOGG.

( 61 ILL. 440. )

*Exemption from execution. Cumulative exemption.*

Under a statute exempting certain personal property from execution, the debtor was entitled to a horse worth \$80; under a subsequent statute in addition to the property already exempt, a horse worth \$100 could be retained. *Held*, that under the two statutes a horse worth \$160 was exempt.

ERROR to the county court of La Salle county. The opinion states the case.

*Frank Crawford, and McDonald & Wedgwood, for plaintiff in error.*

*Stipp, Bowen & Shepherd, for defendant in error*

WALKER, J. Appellant, in his argument, insists that the court below erred in giving appellee's first and second instructions, and in refusing appellant's eleventh. The question which they present is the construction of our statute which exempts personal property from levy and sale under an execution.

The first enactment was adopted in 1843, and was re-enacted in the Revised Statutes of 1845, chapter 57, section 33, and is still in force. The next is the act of 1861 (Sess. L. 121). The 33d section of chapter 57 declares that a number of articles of personal property shall be exempt from levy and sale on execution, naming them, and then declares that "\$60 worth of other property, suited to his or her condition in life, to be selected by the debtor," shall also be exempt, when the debtor is the head of a family, and resides with them, etc.

The act of 1861 declares that, in addition to the property now exempt from levy and sale, the family pictures, school books and family library, household furniture of the value of \$100, one yoke of oxen or one horse in lieu thereof, not exceeding \$100 in value, with the harness therefor, and one plow and harrow, etc., shall be exempted.

The question arising is, whether a person, having no other property not exempt, suitable to his condition in life, but having a horse worth not more than \$160, but more valuable than either exemption, may claim and hold the animal under both statutes.

It is apparent that the horse could not be claimed under either, as it was worth more than the sum named in each. Had it been worth no more than \$60, it could have been claimed under either, as it would have fallen within the spirit, if not the letter, of each law.

A thing named in a statute is not within its provisions unless it be within the intention of the framers of the act. "In the exposition of a statute, then, the leading clue to the construction to be made, is the intention of the legislator, and that may be discovered from different signs. As a primary rule, it is to be collected from the words; when the words are not explicit, it is to be gathered from the occasion and necessity of the law, being the causes which led the legislature to enact it. But in arriving at a conclusion from these premises, the greatest care and circumspection, and the exercise of the soundest judicial discretion are required." Dwarries on Stat. 693.

Then, what was the occasion or necessity which moved the legislature to the adoption of these laws? It was the humane principle, that a creditor should not wholly deprive the husband and father of the means of supporting his family, usually helpless in themselves, and preventing them from becoming a public charge. Great Britain, and the various States of the Union, for this reason, have long had such enactments.

These statutes have not declared what shall be done in a case like the present, and we are left to ascertain the legislative intention, by inference or interpretation. Seeing the intention and purpose that actuated the legislature in adopting these acts, we cannot doubt that had such a case occurred to them, they would have embraced it in the language of the law, because it is fully within its reason. Unless this claim is sanctioned, then we find a person with property not within the letter of either, but within the spirit and reason of both acts, who could have no benefit from their enactment.

To hold that appellee cannot claim this property, is to hold that he may be stripped of all the property of this class that the law-maker intended he should hold. To permit him to retain it, gives him the horse under the more recent statute, as it intended he

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Commercial Insurance Co. v. Treasury Bank.

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should have, and it gives him, at the same time, the \$60 worth suited to his condition in life, under the prior law; and, notwithstanding it is but one horse, it is within the reason of the law, and permissible under these enactments.

It was held, in the case of *Cornelia v. Ellis*, 11 Ill. 584, the debtor might, under the clause authorizing him to select \$60 worth of property, suitable to his condition in life, select and hold a horse of less than that value. From this, and other cases in our reports, it will be seen that the court has not been inclined to give these statutes a strict construction, but have endeavored to execute them according to the intention which actuated the legislature in their adoption.

Then, if a debtor may select and hold a horse not worth \$60, under the former act, and another under the latter act worth not more than \$100, why may he not hold one horse under both acts? The reason is the same in the one case as in the other.

This was the view taken of these statutes by the court below in his instructions, and it was correct.

A careful examination of the evidence has failed to show us that it is not sufficient to sustain the verdict.

Seeing no error in this record, the judgment of the court below must be affirmed.

*Judgment affirmed.*

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COMMERCIAL INSURANCE COMPANY, appellant, v. TREASURY BANK.

(61 Ill. 482.)

*Pleading — indorsement of insurance policy.*

The declaration of a policy of insurance set out in *hæc verba* a copy of the policy, which was payable to B, the insured, and on the back of which was the following: "Loss, if any, under this policy is hereby made payable to Treasury Bank, of Chicago, as its interest may appear." Signed, "J. Farmer secretary." There was no averment that the indorsement was made by the company, or that the insured requested it, or assented to it. *Held* that the declaration failed to show a cause of action in the bank, and the defect was not cured by a verdict in its favor.

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Commercial Insurance Co. v. Treasury Bank.

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MOTION in arrest of judgment. The action was brought by the Treasury Bank of Chicago against the Commercial Insurance Company, on a policy of insurance. The opinion states the case.

*Dent & Black*, for appellant.

*Waite & Clarke*, for appellee.

THORNTON, J. The declaration sets out, in *hæc verba*, a copy of a policy of insurance payable to Boyington, Cash & Wilder, on the back of which is the following indorsement: "Loss, if any, under this policy, is hereby made payable to Treasury Bank of Chicago, as its interest may appear. Nov. 28, 1866. J. Farmer, Sec'y."

There is no averment in the declaration that this indorsement was made by the company, or that the assured requested it, or consented to it.

Objection was made to the introduction of the policy, when offered, and a motion in arrest of judgment was also made.

The pleader has merely averred, in the declaration, that the insurance company executed to Boyington, Cash & Wilder a certain policy in writing, of the words and figures following, — and then follows the policy, dated August 10, 1866. On the back is the indorsement before referred to, of a subsequent date, but the declaration contains no averment whatever in reference to the indorsement.

It was essential to this action that the Treasury Bank should have a right to the policy. This it cannot have, without the assent of the company and the assured. They must act in effecting the indorsement. Without some allegation in the pleading, the mere indorsement proves nothing. No proof would be required in regard to it.

The averment that the following policy was executed to the party originally assured does not, in the remotest degree, connect the bank with the policy. This averment has reference solely to the original policy, and not to the indorsement; because the execution of the latter, so far as the pleadings show, was long subsequent to the execution of the former.

The mere indorsement, then, without apt averments to show that it was a part of the policy, and the manner in which it became such, conferred no right upon the bank to maintain the suit.

Is the omission to state the cause of action cured by verdict?

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Wicker v. Hotchkiss.

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The rule is, that, if the plaintiff totally omit to state his title or cause of action, it need not be proved at the trial, and therefore there is no room for presumption. *Rushton v. Aspinwall*, Doug. 679.

This is not the case of a title defectively set out, which will be aided by verdict, but the total omission of any title in the plaintiff. No implication can arise from any allegation of right in the plaintiff, for there is none. Hence nothing is presumed after verdict, but what is expressly stated in the declaration, or necessarily implied from the facts stated. 2 Tidd's Pr. 919.

Sergeant WILLIAMS, in the note to *Strund v. Hogg*, 1 Wm. Saund. 229 c, says: "The plaintiff need not prove more than what is expressly stated in his declaration, or is necessarily implied from those facts which are stated." See also *Weston v. Mason*, 3 Burr. 1725.

The doctrine is fully settled by all the authorities, that, if a cause of action be stated, though ambiguously and defectively, a general verdict will cure such ambiguity and defect. The presumption then will be, that all the proof necessary to complete the cause of action was made at the trial.

But if, as in this case, there is no statement of any cause of action, no averment that the loss was payable to the plaintiff, with the consent of the company, the omission is not cured by verdict.

The motion in arrest should have prevailed, and the judgment is reversed and the cause remanded.

*Judgment reversed.*

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WICKER, appellant, v. HOTCHKISS.

(20 Ill. 107.)

*Malicious prosecution — probable cause. Advice of counsel.*

Defendant caused an indictment to be found against plaintiff, after stating to counsel all the facts bearing on plaintiff's guilt which he knew or could by reasonable diligence ascertain, and acting in good faith on the advice given. Held, that defendant was not liable in an action for malicious prosecution.

ACTION for malicious prosecution brought by Romine V. Hotchkiss against John H. Wickers. The opinion states the case.

*Goudy & Chandler and E. W. Evans, for appellant.*

*E. & A. Van Buren, for appellee.*

THORNTON, J. This was an action on the case for malicious prosecution. The *gravamen* is the procurement of an indictment for larceny, maliciously and without probable cause; and the consequence the arrest and imprisonment.

There must be proof of both malice and want of probable cause, to render the party liable in this action.

If there was probable cause for procuring the indictment, there can be no liability upon the defendant; and if he communicated to counsel all the facts, bearing upon the guilt or the innocence of the accused, of which he had knowledge, or could by reasonable diligence have ascertained, he ought not to be compelled to respond to the large verdict for \$15,000.

Was there probable cause for the prosecution?

The receipt, signed by the plaintiff and read upon the trial, was conclusive evidence that the defendant owned the cattle at the time they were shipped to Chicago, if there was no proof to explain it. The letter of January 22, 1867, does not change the effect of the receipt. The latter expressly acknowledged the cattle to belong to Wicker, and Hotchkiss agreed to fatten them at his own expense; and when they were sold, Wicker was to be paid a fixed sum, with ten per cent interest thereon, and out of the proceeds of the sale all necessary expenses of transportation, etc., were to be paid, and the overplus, if any, was to be paid to Hotchkiss. His interest was entirely contingent. If the sale was not for a good price, he had none.

Hotchkiss was exceedingly anxious to contract the cattle at a figure which would leave a surplus for him, and for this purpose he evidently wrote to Wicker, and received the reply of January 22d. He testified that it was a reply to one he had written on the 19th of January, which was not introduced. The subsequent letters of Hotchkiss confirm the only construction which can be given to the receipt. He expresses anxiety to have the cattle contracted, so that he can obtain money to purchase corn; begs Wicker to come and see them; asks for a copy of the receipt; says that he can sell for about seventy dollars a yoke for work cattle; and with Wicker's consent will sell a few.



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Why did he wish any consent if he had the right to dispose of them? The consent was not given; and immediately after the failure to consummate an agreement with Wicker to fix a price upon the cattle, or to procure an advance of money from him, he wrote three letters, without date, complaining of a disease of the skin, which had appeared upon the cattle; that some of them were losing fifteen or twenty pounds per week; and yet, in a letter of January 30th, evidently a short time previous to the letters without date, he spoke of the cattle as having done better than any he ever fed, and that he could make them the best cattle which had been shipped from the county. There was matter in these letters calculated to rouse the suspicion of any man.

What followed? Hotchkiss drove thirty-two head of the cattle to a station further from Chicago than the station on the railroad usual for shipment from his neighborhood; shipped them in the night; and sold them in Chicago without the knowledge or consent of Wicker, and appropriated the proceeds of the sale to his own use.

Such were the facts known to Wicker when the prosecution was instituted. The proof upon the trial developed some circumstances which might somewhat relieve the conduct of Hotchkiss, but they were unknown to Wicker at the time the indictment was procured.

Wicker knew that he owned the cattle; that Hotchkiss had agreed to feed them until the 1st of May; that the receipt contained an acknowledgment of Wicker's right to sell; and when he ascertained that a sale had been made, under such circumstances, before the expiration of the time for which the cattle were to be fed—and secretly and without any communication with him—a strong suspicion would not only be aroused, but an honest belief created that the party was guilty of crime. There was reasonable ground for belief of guilt; and there cannot be any liability in an action for malicious prosecution.

Did the prosecutor submit to counsel all the facts within his knowledge, capable of proof, or which he might have known by the exercise of reasonable diligence, and did he act in good faith upon the advice given?

The testimony of Mr. Reed, the State's attorney of Cook county, was, substantially, that Mr. Evans, an attorney of this court, and the prosecutor, came to his office and communicated to him the

facts about the shipment of the cattle at an unusual station, in the night time ; that Hotchkiss had been employed to feed them ; that he had no interest in them and was to be paid for his services ; that he had sold them in Chicago without the knowledge or consent of the prosecutor ; and then the receipt was shown ; and Mr. Reed stated that he thought the party was guilty of larceny.

Counsel for appellee urge that material facts were withheld from the counsel, and that absolute falsehoods were stated.

The facts alleged to have been withheld were some arrangements with one Miller, months prior to the date of the receipt, to feed the cattle, and the purchase of some of them, by Hotchkiss, from another person. All former arrangements about the cattle and rights in them were merged in the receipt. Hotchkiss could not go behind his own written acknowledgment of the ownership of Wicker.

The falsehood charged consists in the statement made to Mr. Reed, that Hotchkiss was not a partner and had no interest in the cattle. Immediately following this statement the receipt was produced, and the counsel remarked, " By this I see that he is not a partner." The entire evidence of any interest of Hotchkiss was embodied in the receipt, and in the production of that the prosecutor discharged his whole duty and disclosed all that he could possibly know.

We think there was a full disclosure of all the facts known, or which, in the exercise of common prudence, might have been known, and that the advice given is a protection against this prosecution. *Ross v. Innis*, 26 Ill. 259 ; *Same v. Same*, 35 id. 487 ; *Walter v. Sample*, 25 Penn. 275.

Counsel for appellee have argued the case as though it was an action for abuse of legal process, or for an arrest for the purpose of extorting money. Such is not the character of the declaration. In such actions it might have been held that it is not necessary to prove malice or want of probable cause, for the law will imply both. *Prough v. Entriken*, 11 Penn. 81 ; *Page v. Cushing*, 38 Me. 523.

There is evidence, in this record, upon which to base the inference of a most oppressive and outrageous abuse of the criminal process for the extortion for money ; but this will not make out the cause of action alleged in the declaration.

Counts might be framed to meet this evidence ; but in the view

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we take of this declaration, and the facts necessary to sustain it, we are compelled to reverse the judgment.

The abstract of appellant is not in accordance with the rules of court; is to some extent unfair and incomplete; and the costs of it must be taxed against appellant.

The judgment is reversed and the cause remanded.

*Judgment reversed.*

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IRISH, plaintiff in error, v. NEWELL.

(83 Ill. 196.)

*Will — testamentary capacity — presumption of law.*

W. was, by a stroke of paralysis, rendered unconscious and incapable of mental action. Four months afterward he made a will. *Held*, not a presumption of law that his unsoundness of mind continued until after the making of the will.

The best form in which the question of testamentary capacity can be stated to the jury is, whether the testator's mind and memory were sufficiently sound to enable him to know and understand the business in which he was engaged at the time he executed the will; and in determining the question the competency of the mind should be judged of by the nature of the act to be done, from a consideration of all the circumstances of the case.

Rules of testamentary capacity criticised.

BILL in equity brought by Louisa Newell and others, against Christian Irish and others, to set aside a will. The opinion states the case.

*C. J. Metzner*, for plaintiffs in error.

*Wheaton, Smith & McDole*, for defendants in error.

MCALLISTER, J. This was a bill in equity, brought under the statute of wills, by defendants in error, as husband and wife, the latter being the only heir at law of Joseph Wing, deceased, against plaintiffs in error, to set aside what purported to be the last will and testament of said Wing, which had been admitted to probate, on the ground of want of testamentary capacity in him, and for

undue influence and fraud exercised and practiced by plaintiffs in error in obtaining its execution.

Answers and replications were filed and an issue made up to be tried at law, whether or not the instrument purporting to be the last will and testament of Joseph Wing, deceased, was his will. This issue was tried by a jury, and a verdict returned that said instrument was not the will of said Joseph Wing. A motion was made for a new trial, which was overruled by the court, to which exception was taken, and a decree was entered setting aside the will and probate thereof. The evidence, rulings of the court, and exceptions were preserved by bill of exceptions, and the defendants below brought the case to this court by writ of error.

Numerous errors have been assigned, many of which are baseless and untenable, but some of them present questions which are deemed worthy of serious consideration.

It appears that Wing, about the 10th day of July, 1866, being then about eighty years of age, was visited with a severe stroke of paralysis, which at the time rendered him quite, if not wholly, unconscious; but upon being bled he recovered his consciousness, and improved to the extent, as stated by his then attending physician, that he knew his acquaintances and what he wanted, but remained helpless, one side continuing paralyzed, and his powers of speech were irrevocably lost; but as to the degree of capacity attained we desire to express no opinion of our own. He survived until May, 1868. On the 21st of November, 1866, something over four months after the attack, the will in question was executed. His condition, about the time of the attack, and its severity, were not much controverted, but it was maintained by the defendants below, who assumed the burden of proof in respect to his sanity, that, however violent the stroke might have been, still he soon recovered measurably from it, and was so far improved at the time of making the will that he then possessed full testamentary capacity. This was controverted by complainants below, who insisted that by the severity of the stroke of paralysis he became and continued, down to the time of making the will, so far deprived of mind and memory as to be incapable of making a valid will; and, at all events, he was thereby reduced to such a weak condition of body and defect of intellect as to render him a mere passive instrument in the hands of those about him, and that, therefore, his feeble condition of body and mind, in connection with the other proof as to surrounding

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circumstances and dominion over him, on the part of some of the defendants below, furnished most essential and convincing proof that this particular will was made without the proper legal consent of the testator.

Such being the theory of the case by the respective parties, each party introduced a large mass of evidence in support of the grounds taken.

On behalf of the complainants, the court, by the third instruction, directed the jury as follows:

“If the jury believe, from the evidence, that, on the 10th day of July, 1866, the deceased, Joseph Wing, was, by a stroke of paralysis, rendered entirely unconscious, and of unsound mind and memory to the extent defined in other instructions, the law presumes such unsoundness of mind to continue until the contrary is proven; and the burden of proof is on those now seeking to establish this will, to show affirmatively, and to the satisfaction of the jury, that said Wing subsequently, and before said alleged will was made, became of a sufficiently sound mind and of a sufficiently rational and disposing mind at the time of the execution thereof, so that he could and did comprehend its motive and effect; and they must establish this by preponderance of proof, or the jury must find against the alleged will.”

Exception was taken to this instruction by the defendants below, and the giving of it was assigned for error.

This instruction was wrong, and must have been very prejudicial to the opposite party. Greenleaf says, “Every man is presumed to be of sane mind until the contrary is shown; but if derangement or imbecility be proved or admitted at any particular period, it is presumed to continue until disproved, *unless the derangement was accidental—caused by the violence of disease.*” 1 Greenlf. on Ev., § 42.

In *Hix v. Whittemore*, 4 Metc. (Mass.) 545, a similar instruction was given. The court, DEWEY, J., delivering the opinion, says:

“The force of presumption arises from our observation and experience of the mutual connection between the facts shown to exist and those sought to be established by inference from those facts. Now, neither observation nor experience shows us that persons who are insane from the effect of some violent disease do not usually recover the right use of their faculties.” Such cases are not unusual, and the return of a sound mind may be anticipated from the subsiding or removal of the disease which has prostrated their

minds. It is not, therefore, to be stated as an unqualified maxim of the law, "once insane presumed to be always insane;" but reference must be had to the peculiar circumstances connected with the insanity of an individual, in deciding upon its effects upon the burden of proof, or how far it may authorize the jury to infer that the same condition or state of mind attaches to the individual at a later period. There must be kept in view the distinction between the inferences to be drawn from proof of an habitual or apparently confirmed insanity and that which may be only temporary. The existence of the former once established would require proof from the other party to show a restoration or recovery; and in the absence of such evidence insanity would be presumed to continue; but if the proof only shows a case of insanity directly connected with some violent disease with which the individual is attacked, the party alleging the insanity must bring his proof of continued insanity to that point of time which bears directly upon the subject in controversy, and not content himself merely with proof of insanity at an earlier period. The learned judge cited the case of *Cartwright v. Cartwright*, 1 Phillim. 100, where the same distinction was taken; also 1 Williams on Executors 17, 18; Swinburne on Wills, part 2, § 3; 1 Collison on Lunacy, 55; Shelford on Lunacy 275; 1 Hale's P. C. 30.

It is no more a presumption of law that a person rendered unconscious and incapable of mental action by stroke of paralysis will continue so for four months thereafter, than that he would so continue when the same effect was produced by a wound on the head. Such a result might follow in either case, but the law does not presume that it would in either.

The instruction we have just been considering is so essentially erroneous, that, for giving it, we must reverse the decree. But we feel constrained to condemn others given on behalf of complaints, viz.: the first, fourth, and fifth. The first is as follows:

"The burden of proof is upon those seeking to establish that the paper introduced in evidence is the will of said Joseph Wing, deceased, to show that at the time of the alleged execution thereof the said Wing was of sound mind and memory, to the extent of understanding what he was about; and that the alleged will was the free and deliberate offspring of a sufficiently rational and disposing mind to comprehend the nature and effect of the will; and it should appear, from *all* the evidence, that it was not the result

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of undue influence exerted by others over a weak and enfeebled intellect to the extent of substituting their will for his ; these are, however, proved till the contrary appears, if the facts are as mentioned in defendants' first and second instructions."

It is correct in reference to the rule announced respecting the burden of proof. But the expression that "it should appear, from *all* the evidence, that it was not the result of undue influence," etc., was calculated to confuse and mislead the jury. And the last clause, commencing with the words "these are," seems utterly meaningless. Instructions should not only be correct in their propositions of law, but should be expressed in clear and concise language, without the interjection of words having a tendency to unnecessarily embarrass or render impossible the maintenance of the case of the opposite party. If the defendants below were required, as this instruction, taken literally, declares, to make it appear from *all* their evidence that the will was not the result of undue influence, they would necessarily fail, no matter how good a case they had upon the preponderance of proof.

The fourth and fifth instructions are as follows :

"Upon the question of the mental capacity necessary to make a valid will, the jury are instructed that, in order to find the alleged instrument to be the will of the deceased, Joseph Wing, they must be satisfied upon the evidence that the said Wing had sufficient strength of mind and memory to take into account and retain in his mind, without dictation from others, the nature and objects of his bounty, the nature and character of his property, and the manner in which he was disposing of it; the person who was the natural object of his bounty, and her claims upon him; the relation which he sustained toward them, who, by the will, were made the recipients of his bounty; and his mind should be sufficient to enable him to have a comprehension that he was disposing of his property by will, and to know how it was being disposed of by said will."

"Upon the question of testamentary capacity, the jury are further instructed that, in order to have sufficient capacity to make a valid will, the testator must have something more than mere passive memory, he must retain sufficient active memory to collect in his mind, without prompting, the particulars or elements of business to be transacted, and to hold them in his mind a sufficient length of time to perceive at least their more obvious relations to

each other, and be able to form some rational judgment in regard to them."

The propositions embodied in these instructions are taken principally from an elementary treatise of a high character, and the last of the two is copied literally from the opinion of the court in *Converse v. Converse*, 21 Vt. 168.

It is probable that no court has ever attempted to lay down any definite rule in respect to the exact amount of mental capacity requisite to the making of a valid will, without appreciating the difficulty of the undertaking; and we experience it in no slight degree. We are unwilling to adopt so low a standard as that approved in *Stewart v. Lispenard*, 26 Wend. 255, that wills of persons of the lowest degree of mental capacity are to be sustained if there is a glimmer of reason. Nor do we approve, as a rule, that embraced in the last instruction. As a passage in legal literature, it sounds well; and as an attempt to group the several elements of capacity, debated by the courts, into one compact sentence, commands admiration. But when closely analyzed, it requires and would convey to the minds of the jurors a degree of capacity which they themselves possessed or which is possessed by the average of mankind in good health. If a man have a memory so active as to collect in his mind, without prompting, all of the particulars or elements of such a business as making a will, and power to hold them in his mind long enough to perceive all their obvious relations to each other, and then be able to form a rational judgment in regard to them, he is a man of ordinary capacity and ability, at least; and a not inconsiderable portion of mankind would, under this rule, be found incapable of making a will, even without the impairing effects of disease. A brief retrospect by any lawyer of experience will lead him to the conclusion that scarcely none of his clients for whom he had drawn wills, were even able to go through with it without much prompting as to particulars, especially where the estate was large, diversified as to kinds of property, and to be distributed among several legatees or devisees. It is true, as said by Justice WASHINGTON, in *Harrison v. Rowan*, 3 Wash. C. C. Rep. 585, "He must, in the language of the law, have a sound and disposing mind and memory. In other words, he ought to be capable of making his will with an understanding of the nature of the business in which he is engaged; a recollection of the property he means to dispose



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of; of the persons who are the objects of this bounty, and the manner in which it is to be distributed between them. It is not necessary that he should view his will with the eye of a lawyer, and comprehend its provisions in their legal form. It is sufficient if he has such mind and memory as will enable him to understand the elements of which it is composed — the disposition of his property in its simple forms."

In *Marsh v. Tyrrell*, 2 Flagg, 122, that eminent and experienced judge, Sir JOHN NICHOLL, said: "It is a great but not uncommon error to suppose that, because a person can understand a question put to him, and can give a rational answer to such question, he is of perfect sound mind, and is capable of making a will for any purpose whatever; whereas the rule of law, and it is the rule of common sense, is far otherwise; the competency of the mind must be judged of by the nature of the act to be done from a consideration of all the circumstances of the case."

The idea here intended to be conveyed by the learned judge is, that a man might not be competent to make a will of one kind and under some circumstances in relation to the estate, the number of objects, and the character of the disposition, when under other and different circumstances, requiring less mental effort, he might be. We know, practically, that it requires a less degree of capacity to thus dispose of a single farm and the usual personal property owned by a farmer, by a distribution among a few recipients, than of a large and diversified estate, among numerous recipients, with various gradations of their bounties. So that there can be no safer practical rule than that the competency of the mind should be judged of by the nature of the act to be done, from a consideration of all of the circumstances of the case. Jarman in his treatise on Wills, volume 1, page 51, after referring to the leading cases upon this subject, comes to the conclusion that the question in its most simple and intelligible form should be stated thus: "Were his mind and memory sufficiently sound to enable him to know and understand the business in which he was engaged at the time he executed the will." And we agree with the observation of the court in *McClintock v. Curd*, 32 Miss. 419, that this is the best form in which the question can be submitted to a jury, with this addition, that in determining the question, the competency of the mind should be judged of by the nature of the act to be done, from a consideration of all the circumstances of the case.

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Tug Boat E. P. Dorr v. Waldron.

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We have discussed this question without any reference to the agency of undue influence or fraud, which presents other considerations. The decree of the court below is reversed and the cause remanded.

*Decree reversed.*

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TUG BOAT E. P. DORR, appellant, v. WALDRON.

(63 Ill. 221.)

*Vessel — validity of lien laws — effect of release on bond.*

A State law creating a lien by attachment on vessels for supplies furnished in her home port, *held* valid.

A tug was attached for supplies furnished in port, and was released on the giving of a bond. The attachment suit was discontinued, another suit commenced for the same cause, and the tug again seized. *Held*, that the seizure was valid, notwithstanding the bond given in the former suit.

ATTACHMENT against the tug boat E. P. Dorr, to enforce a lien for supplies, in favor of Asa D. Waldron and others. The opinion states the case.

*William H. Condon*, for appellant.

*Norman C. Perkins* and *J. A. Crain*, for appellees.

BREELE, J. This was an attachment under the act of 1845, brought to the Superior Court of Chicago, at the June term, 1870.

The proceedings were regular under the statute, by affidavit, bond, statement of the cause of action, and bill of particulars, on which a writ of attachment issued, and was levied on the tug boat in question, "E. P. Dorr," and by reading the writ "to Joseph Moffett, owner of said tug boat."

The boat appeared by attorney and pleaded *nil debit*, and a special plea as follows :

And for a further plea in this behalf, the defendant says, *actio non*, because it says, true it is that plaintiffs had, on December 18, 1869, a good and valid lien against, and on said defendant for supplies furnished to said defendant for the sum of money in said

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declaration mentioned, and on said date caused a writ of attachment to be issued out of and under the seal of the Circuit Court of said Cook county and the State of Illinois, being a court of record of superior jurisdiction, against the defendant, authorizing and directing the seizure and detention of the defendant with its engines, machinery, sails, rigging, tackle, apparel, and furniture, by the sheriff of said Cook county; that by virtue of said writ of attachment, the sheriff of said Cook county, on the 18th day of December, 1869, aforesaid, did attach, seize, and detain said defendant, with its engines, machinery, rigging, sails, tackle, apparel, and furniture, until the 20th day of March, 1870, when said defendant was released from custody of said sheriff, by the order of the Hon. E. S. Williams, judge of said Circuit Court, upon the bond of Joseph Moffett (the owner of said defendant), and W. S. Swan, which said bond was approved by said Hon. E. S. Williams, judge of said Circuit Court, on said March 28, 1870, which said bond released said defendant from the lien sought to be enforced in said suit; that said plaintiffs filed their declaration in said Circuit Court, on December 20, 1869, and defendant filed its plea and affidavit of merits in due time thereafter in time to prevent default; and said cause was at issue in said Circuit Court from the filing of said plea by defendant, until the 21st day of June, 1870, when said suit was dismissed at said plaintiff's costs by said plaintiffs' attorneys, and this suit commenced by said plaintiffs for the same supplies mentioned in the suit previously begun in the Circuit Court as aforesaid.

And this the defendant is ready to verify, wherefore, etc.

To this plea there was a demurrer, which the court sustained. The cause was then, by agreement, submitted to the court, who found for the plaintiffs twelve hundred and sixty dollars and costs, and rendered judgment for the same.

To reverse this judgment the defendant appeals, the bond being executed by Joseph Moffett, describing himself as "of the city of Cleveland, in the State of Ohio, and sole owner of the tug E. P. Dorr."

The only question presented by the pleadings is the decision of the court upon the demurrer to the second plea.

The point presented by that plea is the fact that a prior attachment had been sued out of the Circuit Court against this tug, by which she was held until the 28th day of March, 1870, when she

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was released from the custody of the sheriff by the order of the circuit judge on the execution of a bond by Joseph Moffett, the owner, and one W. S. Swan. The cause was at issue in that court until the 21st day of June, 1870, when the suit was dismissed at the costs of the plaintiffs, and the present suit immediately thereafter, and on the same day, was commenced.

Appellant contends that the act in question, being in derogation of the common law, should be construed strictly, so that when a boat is discharged upon bond being given, the boat would be released from the lien sought to be enforced, and would only be liable to be taken and sold on execution issued on the judgment obtained against the boat, or upon the judgment which might be rendered upon the bond. The point appellant makes is, that the release of the tug by order of the circuit judge, or the execution of the bond, forever discharged the boat from the lien which appellees originally had on it, and that they must now look to their bond or resort to their common-law remedy against the owner of the vessel.

Appellant cites, in support of his views, *Martin v. Dryden et al.*, 1 Gil. 187, and *Conn et al. v. Caldwell*, id. 531.

These cases were under the general attachment law, under the operation of which a lien is created by the levy of the writ of attachment. It follows, necessarily, when a writ, or the suit consequent upon it, is dismissed, the lien is gone; but no one ever supposed that another lien could not be had by the levy of another suit. In this case the lien was not created by the levy, but the levy was to enforce a lien created by law, and existed independent of a levy.

An abortive attempt to foreclose a mortgage by suit, when the cause was not tried on its merits, but dismissed on the plaintiff's motion, would destroy no lien created by the mortgage.

Another point made by appellant is that it does not appear from the papers and proceedings in the cause that the Superior Court had jurisdiction.

This point was not raised in the court below in any form, and is now raised here for the first time, and it is based on the ground that the affidavit does not show the supplies were furnished at the home port of the vessel, and that she was a domestic vessel. *Tug Montauk v. Walker*, 47 Ill. 335.

Had this point been made in the court below the plaintiffs then

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might have taken leave to amend. *Frinkle et al. v. King, Adm'r*, 3 Scam. 144. It is now too late to make the objection.

The general question of the jurisdiction of a State court as conferred by the acts of 1845 and 1857 are considered at some length in *Williamson v. Hogan*, 46 Ill. 504, and the *Tug Montauk v. Walker*, *supra*, and *Schooner Norway v. Jensen*, 52 id. 373, with reference to the Supreme Court of the United States in *The Hine v. Trevor*, 4 Wall., and other cases decided in the same court.

In *The Hine* case the court say, "We are sensible of the extent of the interests to be affected by our decision, and the importance of the principle upon which that decision must rest, and have held the case under advisement for some time, in order that every consideration which would properly influence the result might be deliberately weighed." Page 561. It was then distinctly announced that the jurisdiction of the District Courts of the United States, on the lakes and navigable waters connecting the same, was governed by the act of 1845, and that the jurisdiction is not exclusive, but expressly made concurrent with such remedies as may be given by State laws. Pages 566-569.

*The Hine v. Trevor* was an action for a collision of steamboats running on the Mississippi river. It was decided to be a maritime tort, and cognizable exclusively in the admiralty, by force of the judiciary act of 1789, and properly, as that river was navigable from the sea by vessels of ten or more tons burden.

At the same term the case of *The Moses Taylor* was decided, p. 411. That action was on a contract to transport a passenger by sea from New York to California, clearly a maritime contract, wholly to be performed on the sea, and of which a court of admiralty had exclusive jurisdiction, under the act of 1789. The act of 1845 had no place in the discussion, it was not alluded to by counsel or court, nor could it have been, the only question being, was the remedy given by the act of the legislature of California within the saving clause of the act of 1789? These cases were decided in 1866.

The next, in order of time, was the case of "*The Belfast*," 7 Wall. 624, decided in 1868.

It arose in the State of Alabama on a contract of affreightment of cotton between ports in that State, and was prosecuted under an act of the legislature of that State, entitled, "Proceedings in admiralty," by which a lien was created on the vessel, and proceedings to enforce it were allowed; in which, if there was more

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than one complaint, all were to be consolidated, and the court was required to render but one judgment against the vessel, and that, condemning *ex parte* the boat, tackle, etc., to be sold in satisfaction of the claims, and the affidavit of complaint was made presumptive evidence of the justice of the demand; and by a proviso to the act it was enacted, "unless when otherwise provided in this chapter, the proceedings to enforce the lien shall be the same as in the courts of admiralty of the United States; but either party may have any question of fact decided by a jury, upon an issue made up under the direction of the court."

There was created by this statute a Court of Admiralty in the State of Alabama, whose proceedings were, as in such court, strictly *in rem*, and the law was held to be of no effect, as it trenchanted upon the exclusive jurisdiction of the Federal courts in such cases.

The ground assumed by the libellants was, that the State court had jurisdiction under that clause of the judiciary act of 1789, section 9, which saves "to suitors in all cases the right of a common-law remedy when the common law is competent to give it."

The theory of the defendants was that the libels were libels *in rem*, to enforce a maritime lien in favor of the shippers of the cotton under the contracts of affreightment for its transportation from one port to another, upon navigable waters, and that the State courts had no jurisdiction to employ such a process to enforce such a lien in any case; that the jurisdiction to enforce a maritime lien by a proceeding *in rem*, was exclusively vested in the Federal courts, by the constitution of the United States, and the laws of congress.

The court in the discussion of these questions make but a bare allusion to the act of 1845, and in terms of approval as we understand them. They say, "remarks, it is conceded, are found in the opinion of the court, in the case of *Allen et al. v. Newberry*, 21 How. 245, inconsistent with these views; but they were not necessary to that decision, as the contract in that case was for the transportation of goods on one of the western lakes where the jurisdiction in admiralty is restricted, by an act of congress, to steamboats and other vessels employed in the business of commerce and navigation between ports and places in different States and territories"—referring to *The Hine v. Trevor, supra*.

The court further say, "no such restrictions are contained in the ninth section of the judiciary act, and consequently those

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remarks, as applied to a case falling within that provision, must be regarded as incorrect."

A further allusion is made to the act of 1845, in commenting upon the decision in *The Magnolia*, 20 How. 296, in which the court held that the District Courts exercise jurisdiction over fresh water rivers, "navigable from the sea" by virtue of the ninth section of the judiciary act, and not as conferred by the act of the 20th of February, 1845, which is applicable only to "the lakes and navigable waters connecting said lakes."

The libellants contended that the saving clause in the judiciary act gave a remedy in the State courts — that they had, by that act, concurrent jurisdiction, but the court say, nothing is said in that act about a concurrent jurisdiction in a State court or in any other court, and it is quite clear that in all cases where the parties are citizens of different States, the injured party may pursue the common-law remedy here described and saved, in the Circuit Court of the district as well as in the State courts.

They say, "original cognizance is exclusive in the District Courts, except that the suitor may, if he sees fit, elect to pursue a common-law remedy in the State courts or in the Circuit Court, as before explained, in all cases where such a remedy is applicable. Common-law remedies are not applicable to enforce a maritime lien by a proceeding *in rem*," etc.; and further, "State legislatures have no authority to create a maritime lien, nor can they confer any jurisdiction upon a State court to enforce such a lien by a suit or proceeding *in rem* as practiced in the admiralty courts."

This was all well said, doubtless, as applicable to the Alabama State law where the proceedings were designed to be *in rem* as practiced in the admiralty courts.

But in concluding the opinion the court says, "such a lien (a maritime lien) does not arise in a contract for materials and supplies furnished to a vessel in her home port, and in respect to such contracts, it is competent for the States, under the decisions of this court, to create such liens as their legislatures may deem just and expedient, not amounting to a regulation of commerce, and to enact reasonable rules and regulations prescribing the mode of their enforcement," referring to *The General Smith*, 4 Wheat. 438, and is the ground assumed by this court in *William v. Hogan*, 46 U. 504.

It will be noticed, nothing is said in *The Belfast*, about the

saving clause of the act of 1845, though regarding, in the most unqualified terms, the operation of that act on our lakes and rivers.

At the same term of the court came on the case of the steam tug *Eagle*, 8 Wall. 15.

This was an appeal from the District Court for the eastern district of Michigan, in which the question made on this record, was not before the court in any shape. It was there held that this act of 1845 was obsolete and inoperative. Since the decision in *The Genesee Chief*, 12 How. 243, in which it was held that the jurisdiction of the District Courts in such cases extended over all the navigable waters of the United States, without regard to the ebbing and flowing of the tide.

In the opinion delivered in that case by Chief Justice TANEX, it is nowhere intimated that the act of 1845 was not, what it purported to be, an act to extend the jurisdiction of those courts, and valid, and binding, and operative. That case arose under that act, and was prosecuted under it.

The effect of the decision was to overrule the many prior decisions of that court upon the question of the limit of the jurisdiction of the District Courts. The chief justice said, in that very case, that the act of 1845 was a limitation of the powers previously conferred on the Federal courts.

The opinion in the case of *The Eagle*, *supra*, declares the act is obsolete and of no effect, with the exception of the clause which gives to either party the right of trial by jury when requested, which, the court say, is rather a mode of exercising jurisdiction than any substantial part of it. The saving clause in this act as to the concurrent remedy at common law is, in effect, the same as in the act of 1789, and is, therefore, of necessity, useless and of no effect.

It will be seen, the question raised in the case before us was not a question in *The Eagle*, and whatever may have been said touching it was *obiter*.

We had thought there might be a necessity for the act of February 3, 1845, inasmuch as by the judiciary act of 1789, admiralty jurisdiction extended only to such waters as were navigable from the sea by vessels of ten tons burden and upward. The lakes were not so navigable.

The important saving in the act of 1845 "saving any concurrent remedy which may be given by the State laws, when such steamer



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or other vessel is employed in such business of commerce and navigation," is omitted from the consideration of the court. It is not decided congress was incompetent to enact such a clause. It would seem if that body could provide a saving of one kind it could another, and here it is provided, in the record, in express terms.

The record contains no exceptions preserving the evidence. Every intendment, therefore, must be indulged in favor of the finding of the court as in the case of the verdict of a jury. We will presume, in the absence of the evidence, that every fact requisite to bring the case within the jurisdiction of the court, and establish a cause of action under the statute, was proved upon the trial.

The proceedings have no resemblance to those in courts of admiralty, but are of the same character as in an ordinary attachment under the statute, requiring notice to be given of the pendency of the suit, and no prior liens are interfered with. *Germain v. Steam Tug Indiana*, 11 Ill. 535; *The Belfast*, *supra*.

For the reasons given the judgment is affirmed.

*Judgment affirmed.*

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MERCHANTS' INSURANCE COMPANY, appellants, v. MORRISON.

(32 Ill. 242.)

*Marine insurance — "time" policy — warranty of seaworthiness.*

A vessel lying in port was insured from April 1 to November 30. The vessel was to be employed in navigating certain inland waters, and sailed first on April 10. *Held*, that the policy being a "time" policy, there was no implied warranty that the vessel was seaworthy at the time of starting on the first voyage.

ACTION by Ezekiel Morrison against the Merchants' Insurance Company of Chicago, on a policy of marine insurance. The opinion states the case.

*Hitchcock, Dupes & Evarts*, for appellant.

*H. S. Moore and Sidney Smith*, for appellee.

MCALLISTER, J. In June, 1868, the appellee, being engaged in the lumber business at Muskegon Lake, in Michigan, became the owner of the then propeller "Omar Pacha."

This lake is situated some five miles from the east shore of Lake Michigan, is connected with the latter by a navigable river called the Muskegon river; constitutes a safe harbor, and is known as the Port of Muskegon. During the remainder of the season of 1868, after appellee became the owner, the propeller was employed by him in the lumber trade between that port and Chicago; at the close of navigation the vessel was taken to the Muskegon harbor, where she remained until the 10th of April, 1869; during the winter of 1868-69 she was thoroughly overhauled, repaired, and changed into a lumber barge, the work and repairs costing upward of ten thousand dollars. On the 1st of April, 1869, while the vessel was still in that harbor, through the action of an insurance agent and solicitor a policy of insurance upon the body, tackle, apparel, and other furniture of this vessel was issued by appellant to appellee, insuring the same in the sum of \$3,000, from noon of the 1st day of April, 1869, to noon of the 30th day of November, 1869. This was a valued policy, containing an express warranty on the part of the assured that the vessel was then in safety; that she was to be employed exclusively in the freighting and passenger business, and to navigate only the waters, bays, harbors, rivers, canals, and other tributaries of Lakes Superior, Michigan, Huron, St. Clair, Erie, and Ontario, and river St. Lawrence to Quebec, usually navigated by vessels of her class during the portion of the life of the policy between noon of April 1 and noon of November 30th.

The perils insured against were of the lakes, rivers, canals, fires, and jettison, excepting all perils, losses, misfortunes, or expenses consequent upon, and arising from or caused by the following or other legally excluded causes, viz.: \* \* \* "Incompetency of the master, or insufficiency of the crew, or want of ordinary care and skill in navigating said vessel, and in loading, stowing and securing the cargo of said vessel, rottenness, inherent defects, overloading, and all other unseaworthiness," etc.

The policy contained the usual recital of payment of the premium.

The vessel remained in the port where the repairs had been made, where she was at the time the policy was issued, until the 10th day of April, 1869, when, being laden with a cargo of lumber,

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she set out upon a voyage to Chicago. She continued engaged in the lumber trade between those ports until the 8th day of October, 1869, and then, while lying at a dock in the Muskegon harbor, and during the life of the policy, she was consumed by fire, not the result of unseaworthiness.

The usual protest, proof of loss and abandonment necessary to charge the underwriters, having been made and the appellant having refused to pay the amount insured, this action was brought upon the policy. The cause was tried before the court and a jury after hearing the evidence, which was conflicting, the jury returned a verdict in favor of the assured, upon which judgment was rendered, and the case brought to this court by appeal.

A single question of law has been presented and discussed in this court. Upon the trial the court permitted the insurance company to introduce evidence tending to show the want of seaworthiness of the vessel during the season of 1869, but with the avowed purpose of showing that she was unseaworthy at the time of setting out upon her first voyage after the insurance. Many witnesses were examined as to this point, upon both sides; but when we consider the presumption of law that she was seaworthy, the clear and satisfactory evidence of the thorough overhauling and repairs which she had received immediately previous to setting out upon such voyage, and contrast the strength of appellee's case with that sought to be made by appellant, it seems to us that the clear weight and preponderance of evidence are with the appellee. Nevertheless, there was sufficient to warrant appellant in asking the court to submit the question of fact to the jury, if the counsel were right in their law as involved in the following instruction, which the court refused :

"The jury are instructed that the law implies a warranty on the part of the plaintiff that the 'Omar Pacha' was seaworthy on setting out upon her first voyage after the time from which the policy was to take effect, provided she set out on such voyage from a port in which proper repairs could have been made; and if they believe, from the evidence, that she was not seaworthy when she left such port on such voyage they will find for the defendant."

The refusal to give this instruction forms the basis of appellant's argument. The policy, we have seen, was made on the 1st day of April, 1869, whereby the vessel was in terms insured against certain perils, among which were those of fire, from noon of that day.

Under these circumstances, did the law imply a warranty that the vessel should be seaworthy when she set out upon her first voyage from that port; and was it requisite that she was seaworthy at that time, in the sense of that term as applied to voyage policies, in order to make the policy attach and charge the insurer for a subsequent loss by fire not arising from want of seaworthiness? We think not. To so hold would not be the mere recognition of a condition to the policy by implication of law, and in respect to which the contract was silent, but would be to vary its terms and legal effect.

It is a general rule of law that when parties have deliberately put their engagements into writing in such terms as import a legal obligation, without any uncertainty as to the object or extent of such engagement, it is conclusively presumed that the whole engagement of the parties, and the extent and manner of their undertaking, was reduced to writing. 1 Greenl. Ev., § 275.

There was no attempt to interpret or explain any of the terms of the policy by offering proof of any known and established usage respecting the subject, so that the position assumed must have its foundation, if it have any, in the peculiar rule of the law merchant and common law — that every voyage policy implies a warranty of seaworthiness. Then, what is that warranty? It imports that the ship is staunch and sound, of sufficient materials and construction, with sufficient sails, tackle, rigging, cables, anchors, stores, and supplies; a captain of competent skill and capacity; a competent and sufficient crew; a pilot, when necessary, and generally, that she is, in every respect, fit for the voyage insured. This warranty relates to the beginning of the risk, and that is when the vessel sails. 2 Greenl. on Ev., § 400; 3 Kent's Com. 289.

And it is the general rule that the vessel must be seaworthy in the sense mentioned, at the commencement or inception of the risk, in order that the policy attach and charge the insurer. Seaworthiness at the commencement of a voyage is a condition precedent, and, if it does not then exist, the policy is void, and the insurers are not responsible for a subsequent loss, even if it arises from another cause. *Prescott v. U. S. Ins. Co.*, 1 Whart. 399; *Starbuck v. N. E. Ins. Co.*, 19 Pick. 199; *Capon v. Washington Ins. Co.*, 12 Cush. 517.

These are inflexible, arbitrary rules of the common law, and are

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as applicable to risks of that character upon our lakes as upon the high seas. But their applicability to time policies was seriously questioned, if not denied, in *Capen v. Washington Ins. Co.*, above cited; and Chief Justice SHAW pointed out some of the distinctions between the two kinds of policies with his usual clearness and force. Afterward, the case of *Gibson v. Small* came up in the English House of Lords, 24 Eng. L. & Eq. 17, involving the question of implied warranty of seaworthiness in the case of a time policy, in the sense of its application to a voyage policy. The subject was most elaborately discussed by the several judges, and the distinguishing features of the two kinds of instruments were pointed out with admirable perspicuity. There, however, the policy was upon a vessel in an unknown sea, and in an unknown condition; but in the case of *Thompson v. Hopper*, 6 El. & Bl. 172; 34 Eng. L. & Eq. 266, the action was upon a time policy issued upon a vessel in port where the owner resided, and the court held that there was no implied warranty of seaworthiness which, if broken, would prevent the policy from attaching. See, also, *Jones v. Ins. Co.*, 2 Wall., Jr., 278.

The question was examined in the English courts with so much research and ability that it would be idle, if not presumptuous, to attempt to throw any further light upon it; but it seems to us that the reasons assigned by the English judges against the implication of such a warranty in the case of time policies on vessels engaged in the general and ceaseless commerce of the great oceans or high seas, apply with even greater force to those on vessels engaged upon our north-western lakes, because here, from the rigor of the climate, vessels are generally compelled to lie, during the cold season, some four or five months in ports or harbors, imbedded in ice, and where the principal peril to which they are exposed is that of fire, and against which it is lawful for the owner to obtain insurance. But the circumstances would require a policy essentially different from the usual voyage policy. It might be expedient to make the policy cover the whole time during which the vessel was to so lie in harbor, and also that of the ensuing season of navigation. To be fully applicable to the circumstances, the policy should be made to cover the perils of fire as well as of the lakes, rivers, etc. Suppose the owner, while his vessel is fast in the ice of a Michigan or Chicago port, should obtain a policy on the 1st day of January, insuring her against all the perils suggested from noon of that day until

noon of the 30th day of the following November, would there be any reason in support of the position that such a policy implied a warranty of seaworthiness as that warranty has been defined, or for holding that the operation of the policy was suspended; that the risk did not commence until the vessel set out upon her first voyage in the spring; and that, if she was not *then* seaworthy, the policy never attached at all? Yet that is the precise doctrine of appellant's instruction. It is manifest that to so hold would be to say that, upon this subject, parties were not competent to make such a contract as they thought fit; that whatever might be the necessities of the case or the terms of their contract, still the law would so control it as to make it speak a particular language, and *that* the same as another contract, which they did not make. The policy would declare, in plain language, that the risk commenced, and the policy became operative, at noon of the 1st day of January; but the courts, that the risk did not commence, or the policy become operative, no matter how fairly obtained, unless the vessel was seaworthy when she sailed upon her first voyage in the spring.

This is the proposition embodied in the instruction which appellant's counsel asked the court to give, the refusal of which, by the court, they have endeavored to convince us, was error. The instruction is not based, it will be observed, upon the hypothesis, that the vessel was about to depart on a voyage when the policy issued; and the principle involved in it is all the same, whether the policy was made ten days or three months before the vessel sailed.

It would lead to great embarrassment if the vessel owner cannot obtain a policy like that in question without its being arbitrarily subjected to the same rules incident to voyage policies. Aside from the circumstance of the vessel lying ice-bound for several months, is the further circumstance, that much of the commerce upon the lakes is carried on between ports which are not remote from each other.

Hence, voyages are short and quickly and frequently made. In such case there would be an obvious inconvenience in the use of voyage policies. This inconvenience, together with the other peculiarity of navigation upon the lakes we have mentioned, dictate the propriety of seeking a substitute for the usual voyage policy, in another form of contract, which, in the very necessities of the case, must be substantially different. Such a contract is the one sued upon in this case. We are of opinion that the vessel owner, if insurance com-

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panies choose to concur in his wishes, has the legal right to adopt the substitute and enjoy it, if fairly obtained, untrammelled with the incident which the law attaches to a voyage policy.

There was, therefore, no error in the rulings of the court below, the evidence sustains the verdict, and the judgment must be affirmed.

*Judgment affirmed.*

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CHICAGO, DANVILLE & VINCENNES RAILROAD COMPANY, plaintiff  
in error, v. SMITH.

(22 Ill. 268.)

*Constitutional law — municipal aid to railroads.*

An act of the legislature authorizing towns to appropriate money, as a donation, to aid in the construction of a railroad, is constitutional.

BILL filed by Frederick Smith against The Chicago, Danville & Vincennes Railroad Company and others, to obtain an injunction. The opinion states the case.

*E. Walker*, for plaintiff in error.

*G. D. A. Parks* and *Chas. A. Hill*, for defendant in error.

THORNTON, J. Defendant in error filed his bill in the Circuit Court to enjoin the collection of taxes levied under an act of the legislature and in pursuance of a vote of the people, to aid in the construction of a railroad.

The act authorized all towns acting under the township organization law, to appropriate such sums of money as they should deem proper to aid in the construction of the road, to be paid as soon as the track should have been located and constructed through the towns. The road was completed before the appropriation was made; and it was a donation to the company, and not a subscription to its capital stock. Upon the hearing the Circuit Court made the injunction perpetual, and pronounced the act unconstitutional.

The officers of the town, who made the appropriation and levied the tax, were the "corporate authorities" of a municipal corporation; and they acted in the premises, after a majority of the legal voters of the municipality had authorized the appropriation, upon the condition of the prior construction of the road.

The only question is as to the power of the legislature to authorize municipalities to subscribe to the capital stock of railroad companies, and to appropriate money, as a donation, to aid in the construction of the roads.

The only difference between this case and numerous cases decided by this court is, that the money appropriated by virtue of the statute in question is a donation instead of a subscription. But for this difference we might stand securely upon the maxim: *Stare decisis et non quieta movere*. Frequent fluctuations, in the opinions of courts of last resort, involve the court in absurdities; render the law uncertain; destroy that feeling of reliance so essential to the strength and stability of all authority, and produce mischiefs innumerable. The decisions of courts had better be involved in some error, than subject to change upon every change of the judiciary.

In the discussion of legislative power, we have nothing to do with questions of policy or expediency. The constitution has created the legislative and judicial departments; the one to make the law, the other to construe and administer it. It may be mischievous in the effects, burdensome upon the people, conflict with our conceptions of natural right, abstract justice, or pure morality, and of doubtful propriety in numerous respects; and yet we would not be justified to hold, that it was not within the scope of legislative authority for such reasons.

The question as to the repugnancy of a law to the constitution is always one of much delicacy, and courts will never indulge the supposition, unless the repugnancy is manifest to the understanding.

In *Lane v. Dorman*, 3 Scam. 238, this court said: "The determining of a question involving the inquiry whether an exercise of power, by the legislative department of the State, is constitutional, is readily conceded, not only to be a matter of delicacy, but of grave import, and demands the most deliberate and mature consideration. It should not, however, be decided but in cases of clear necessity, and where the character of the act done is in plain and obvious conflict with the constitution."



## Chicago, Danville and Vincennes Railroad Co. v. Smith.

The law should not be pronounced void in a doubtful case, or upon slight implication. "The opposition between it and the constitution must be clear and strong." *People v. Marshall*, 1 Gilm. 672. The infringement of the constitution must be evident before the courts will interpose and hold the act nugatory. *People v. Hatch*, 33 Ill. 130. In *ex parte M'Collum*, 1 Cow. 504, SAVAGE, C. J., said that a court ought not to declare a law unconstitutional, unless a case is presented in which there can be no rational doubt.

In delivering the opinion in the case of *Fletcher v. Peck*, 6 Cranch, 87, MARSHALL, C. J., said: "The question, whether a law be void for its repugnancy to the constitution, is at all times a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case. The court, when impelled by a duty to render such a judgment, would be unworthy of its station, could it be unmindful of the solemn obligations which that station imposes. But it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other."

In the same court, whose decision is chiefly relied on to induce a reversal of the former opinions of this court, equally explicit language, in regard to the duty of courts, has been used.

In *Twitchell v. Blodgett*, 13 Mich. 152, COOLEY, J., said: "It is conceded to be the settled doctrine of this State, that every enactment of the State legislature is presumed to be constitutional and valid; that before we can pronounce it otherwise, we must be able to point out the precise clause in the constitution which it violates, and that the conflict between the two must be clear, or free from reasonable doubt, since it is only from constitutional provision, limiting the legislative power and controlling the legislative will, that we derive authority to declare void any legislative enactment."

We might multiply extracts from the opinions of the ablest courts to the same effect. Enough has been cited to show the firm position of the judiciary, that the courts ought not, and, in justice to the rights of a co-ordinate department of the State government, cannot, declare a law to be void, without a strong and earnest conviction, divested of all reasonable doubt, of its invalidity.

An objection to this law is urged, which has been made since the origin of the character of legislation now under consideration.

It is assumed that the taxes levied are to be appropriated to a private and not a public purpose; that the benefits, resulting to the public—the people at large—from the construction of railroads, are merely incidental; that the profits, arising from their operation, enrich the individuals who form the private corporation; and, therefore, all laws imposing taxes to aid in the building of railroads, to be owned and operated by private corporations, are unconstitutional.

If the premises are correct, that the corporations are strictly private, and the benefits to the public purely incidental, the conclusion might logically follow. The argument assumes as unquestionable, the point to be determined; as true, the fact to be ascertained.

In the enactment of laws the legislature must exercise its judgment and discretion. As to questions of pure policy and expediency, no express or necessarily implied constitutional provision intervening, it is the sole judge. It has also the undoubted right to take a comprehensive view in determining the necessity of a law, and the character of the purpose to be accomplished by it. A court, with any propriety, cannot arrogate to itself all power and wisdom in such matters; and if there be grave doubt as to the nature of the purpose, the doubt must always be solved in favor of the action of the legislature.

Concede that taxation for a mere private enterprise is wrong and invalid, is the construction of the road to which the aid is proposed to be given of that character? It is a road from Lake Michigan to a point opposite Vincennes, in the State of Indiana, traversing nearly the entire length of the State. The road was completed before the payment of any money was asked, though it was built upon the faith of it.

Are the advantages which accrue to the public from the construction and operation of railroads merely incidental in the sense of the term as commonly used? We are inclined to think that they rather resemble the incident in law, and appertain to, and follow, the principal thing. The benefits resulting to the people of the State, from our system of railroads, are untold and incalculable. The mind can scarcely grasp them. Railroads have almost superseded all other means of inter-communication between the several parts of our extensive and growing State. They have become an

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absolute necessity, indispensable to our increased growth, and to the removal of our immense surplus. They have added millions to our taxable property; given augmented facilities to every department of trade; enriched the mass of people; largely enhanced the value of our lands; built up manufactures; and brought us into close proximity with the best markets of the country. All share in the blessings flowing from them.

Railroads are, in truth, the people's highways for pleasure, and business, and commerce. Without them our internal trade would languish and die; and our corn and wheat rot in our granaries.

For more than a quarter of a century the courts have recognized and referred to them as public improvements, made for the public good, and to subserve the public interests. *Johnson v. The County of Stark*, 24 Ill. 75; *Cin., Wil. & Zanesville R. R. Co. v. The Commissioners*, 21 Ohio (1 McCook), 77; *Sharpless v. The Mayor, etc.*, 21 Penn. (9 Harris), 149; *Nichol v. Mayor and Aldermen*, 9 Humph. 252; *Goddin v. Crump*, 8 Leigh, 120; *Enfield Toll Bridge Co. v. Hart. & N. H. R. R. Co.*, 17 Conn. 40; *Beckman v. Saratoga & Schenectady R. R. Co.*, 3 Paige, 45; *Bloodgood v. Mohawk & H. R. R. Co.*, 18 Wend. 9; *Newbury Turnpike Co. v. Eastern R. R. Co.*, 23 Pick. 326.

The courts, while ready and willing to protect these corporations in all their rights, have uniformly asserted, and seem determined to maintain their obligations to the public. The principles of common law, and their charters accepted by them, and which clothe them with a portion of the sovereignty of the State, impose duties upon them to the public, which they must discharge. They can be compelled, by the mandates of the courts to a full performance of them; and parties seeking redress need not resort to the imperfect action at common law, but may apply for the more effectual remedy by *mandamus*.

Railways are improved public highways; and the courts have uniformly held that they are of such public use as to justify the exercise of the right of eminent domain, in taking all real estate that may be necessary for the construction and maintenance of the road, its depots, side tracks, stations, machine shops, and other necessary appendages, disfiguring and rendering unfit for cultivation farms, and even in destroying dwellings.

The necessity and expediency for the exercise of this right, in making public improvements, either for the benefit of all the

people of the State, or of a particular municipality, must be determined by the legislature.

Mere convenience is not sufficient to justify the exercise of the right. The public use must be necessary and pressing. In referring to the urgency of the public use, WOODBURY, J., in the case of *West River Bridge Co. v. Dix*, 6 How. 546, said: "So as to a road, if really demanded in particular forms and places, to accommodate a growing and changing community, and to keep up with the wants and improvements of the age—such as its pressing demands for easier and social intercourse—quicker political communication, or better internal trade—and advancing with the public necessities from blazed trees to bridle paths, and thence to wheel-roads, turnpikes, and railroads."

Though the distinction between the right of eminent domain and the power of taxation may be manifest, yet, when the public use, necessary for the exercise of the former, has been settled by both the legislative and judicial departments, and a particular enterprise has thus been fixed as of public importance, the position is very much strengthened, that taxation for such an enterprise is for a public purpose.

This court has decided that such corporations are created for the public good; to increase the facilities and conveniences, and promote the great ends of commerce; and that they cannot organize monopolies, and make contracts injurious to the public interests. *Vincent v. C. & A. R. R. Co.*, 49 Ill. 33; *Chi. & N. W. R. R. Co. v. The People ex rel. Hempstead*, 56 id. 365.

In view of the past history of railroads, the impossibility of dispensing with them, the necessity of an increase of the number to open new outlets for the products of our fertile and inexhaustible soil—all of which were well known to the legislature—and sustained by numerous authorities—we must hold, that, even if the appropriation in this case was not for a public purpose in the broadest sense, the character of the purpose is involved in such doubt that we cannot declare void the action of the legislature.

Is the law, under consideration, in violation of the fifth section of the ninth article of the constitution of 1848? That section provides that "The corporate authorities of counties, townships, school-districts, cities, towns, and villages, may be vested with power to assess and collect taxes for corporate purposes; such taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same."

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It is contended that the appropriation was not for a "corporate purpose." If it was for a public purpose — for the benefit of the inhabitants of the municipality — then it would be for a corporate purpose. The latter cannot be distinguished from the former; and all that we have said in relation to the public purpose of the tax, will apply with equal force to a corporate purpose. We refer to the following cases, in which the questions discussed have been settled by this court. *Prettyman v. The Supervisors of Tazewell County*, 19 Ill. 406; *Johnson v. The County of Stark*, *supra*; *Perkins v. Lewis*, 24 Ill. 208; *Butler v. Dunham*, 27 id. 474; *The President and Trustees v. Frick*, 34 id. 405.

In the case of *Nichol v. The Mayor and Aldermen*, *supra*, a subscription by the city of Nashville to a railroad was held to be for a corporate purpose. The constitution of Tennessee provides that "The general assembly shall have power to authorize the several counties and incorporated towns in this State to impose taxes for county and corporation purposes respectively." The language is substantially the same as in our constitution. The city of Nashville having subscribed, a bill was filed to restrain the issue of bonds; and the court decided that the legislature had power to authorize the subscription; that the construction of the road was a corporate purpose; and that the city might either levy the tax or issue bonds to obtain the money.

In *Taylor v. Thompson*, 42 Ill. 9, this court defined a corporate purpose to mean: "A tax to be expended in a manner which shall promote the general prosperity and welfare of the municipality which levies it."

We accept this definition and are of opinion that no person can doubt but that taxes, expended to aid in the construction of a railroad, must promote the general prosperity.

The remaining question is, whether a distinction exists between a donation in aid of the road, and a subscription to the capital stock of the corporation? The distinction is more apparent than real; indeed, to our view, is entirely shadowy.

No principle would justify the authority to a municipal corporation to become a stockholder in a railroad company, merely to acquire equitable rights, and to prevent the misapplication of the funds. The power is granted in consideration of the public benefits, and these are as great in the one case as in the other.

The decree of the court below is reversed and the cause remanded.

*Decree reversed.*

**HEFNER, appellant, v. VANDOLAH.**

(22 ILL. 483.)

*Promissory note — ratification of forged note.*

The name of H. was attached to a note as surety without his authority; but afterward it was shown to him and he admitted the signature to be his. *Held*, that he was estopped from denying the execution of the note. (*See note, p. 108.*)

ACTION by David Vandolah against Marston Hefner on a promissory note. The opinion states the case.

*Williams & Burr*, for appellant.

*Weldon & Benjamin*, for appellee.

SHELDON, J. This was an action of assumpsit, brought by appellee against appellant, upon a promissory note purporting to have been made by appellant and one Coman.

Appellant by plea, verified by affidavit, denied the making of the note, and it is not claimed that he did make it, but it is insisted that by certain declarations made by him, he is estopped from denying the making of the note.

The note sued on is as follows :

“\$700.

Sept. 25, 1869.

“Six months after date, we promise to pay to the order of David Vandolah seven hundred dollars at twelve per cent interest, for value received.

“W. COMAN.

“MARSTON HEFNER.”

The cause was tried by the court, without the intervention of a jury, the issue found for the plaintiff and his damages assessed at the sum of seven hundred and ninety dollars and seventy-three cents, for which, after overruling a motion for a new trial, judgment was rendered against the defendant, from which he prosecutes this appeal.

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The only questions raised are, as to the sufficiency of the admissions and declarations of Hefner to render him liable upon the note, and as to the correctness of a judgment for the principal and interest of the note bearing, as it does, upon its face, the usurious rate of interest of twelve per cent.

The argument of appellant's counsel proceeds entirely upon the ground, that the acts and admissions of Hefner, in order to charge him with liability upon this note which he never executed, must be of such a character as to constitute an estoppel *in pais*, having the element of actual damage from delay occasioned by the acts of Hefner misleading Vandolah; and that the evidence comes short of making such a case. Without considering whether there may not be enough to support the judgment on that ground, we apprehend nothing more is necessary to be shown here, than that Hefner adopted and ratified his forged signature upon the note, to render him liable thereon.

It was in evidence, that soon after the time the note bears date, Vandolah showed it to Hefner, intimating a doubt as to its genuineness, and expressing a wish to know in regard to it; that Hefner examined the note expressing nothing definite, but intimating that the signature might be his, and saying that he would let Vandolah know in a few days; after a lapse of a few days, Hefner told Vandolah that he had signed the note. There was abundant evidence to justify the court in finding that Hefner unequivocally and understandingly adopted and ratified the use of his name on this note.

If there had been an original assent on the part of the defendant to the placing of the signature of his name upon the note by Coman, the principal promisor, there can be no question that he would have been bound by it.

The subsequent assent of Hefner to, and ratification of the unauthorized use of his name on the note by Coman, must, as we conceive, have the same effect to charge the former, as if he had originally authorized the signature of his name to the note by Coman. Such subsequent assent and ratification would be equivalent to an original authority, and confirm what was originally an unauthorized and illegal act. Story on Agency, §§ 239, 253.

We conceive that the same rule should apply here as in the case of the adoption or ratification of an ordinary act of assumed agency; that the form of signature not bearing any indication of the fact

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of its being made by another hand, does not prevent the person whose name is placed on the note from being legally holden ; upon proof that the signature was previously authorized, or subsequently adopted. Nor is it necessary, to establish a ratification, that there had been any previous agency created. An act wholly unauthorized may be made valid by subsequent ratification. *Culver v. Ashley*, 19 Pick. 301.

As fully sustaining the views here expressed, we refer to the following authorities : *Commercial Bank of Buffalo v. Warren*, 15 N. Y. 577 ; *Greenfield Bank v. Craft et al.*, 4 Allen, 447 ; *Casco Bank v. Keene*, 53 Me. 103 ; *Livingston v. Wiler*, 32 Ill. 387.

This does not present the case of admission, under a mistaken belief, that the signature was genuine. In this respect, a marked difference exists between the present case and that of *Hefner v. James Vandolah*, 57 Ill. 520. In that case Hefner had not seen the note, and as he had signed several notes as surety for Coman, he might well have supposed that the note which Vandolah mentioned to him as having, not stating its amount, was one which he had signed ; and all his supposed acts of adoption and ratification might well have proceeded upon that false assumption. In the present case, the acts and admissions of the defendant were, after a careful actual examination of the note, and time taken for consideration, with full knowledge that the signature was not in his handwriting.

As the note upon its face bore a greater rate of interest than ten per cent, the whole of the interest was forfeited under the statute, and only the principal sum due was recoverable.

For error in this respect, in rendering judgment for interest upon the note, the judgment must be reversed and the cause remanded.

*Judgment reversed.*

**NOTE.**—In *McHugh v. County of Schuylkill*, 5 Am. Rep. 445 (67 Penn. St. 391), it was held that the ratification of the signing of a bond, by an obligor whose signature was forged, does not render him liable thereon, there being no new consideration.

In *Negley v. Lindsey*, 5 Am. Rep. 437 (67 Penn. St. 217), it was held that a contract tainted with fraud may be ratified without a new contract founded on a new consideration. In that case the doctrine of ratification was very fully considered as were also the American cases.

In *Brooke v. Hook*, L. R., 6 Ex. 89 (3 Alb. L. J. 265), it was held that a forged signature could not be ratified. That was an action on a joint and several promissory note purporting to bear the signatures of defendant and J. The plaintiff had received the note from J. on the day of its date, and before the expiration of the three months he had an interview with the defendant and showed him the note. The defendant denied that the signature was his and said it must be a forgery of J.'s; upon which plaintiff said he would consult a lawyer with a view of proceeding criminally against J. The defendant said, rather than



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that he would pay the money; and thereupon he signed the following paper: "Memorandum, that I hold myself responsible for a bill dated Nov. 7, 1869, for \$01., bearing my signature and J.'s, in favor of Mr. Brooks." *Held*, per KELLEY, C. B., CHANNELL and PIERCE, BB., that the act of J. in signing defendant's name to the note being illegal and void, was incapable of ratification; and further that the paper taken together with the previous conversation was not a ratification, but amounted in effect, to a corrupt and illegal agreement by the defendant to admit that the signature was his own in consideration that the plaintiff would not prosecute for forgery and that it worked no estoppel precluding the defendant from showing at the trial that the signature was a forgery. MARTIN, B., was of the opinion that J.'s act was capable of ratification, and that the memorandum amounted to a ratification.

This case is, however, against the weight of authority. *Howard v. Duncan*, 3 Lans. 174; *Foran v. Day*, 46 Me. 176; *Greenfield Bank v. Crafts*, 4 Allen, 447; *Livingston v. Wiler*, 33 Ill. 337; *Union Bank v. Middlebrook*, 33 Conn. 95; *Fitzpatrick v. School Commissioners*, 7 Humph. 304; *Thorn v. Bell*, Lalor's Sup. (N. Y.) 430.

In *National Bank v. National Mechanics' Banking Association*, 55 N. Y. 311, it was held that a mistake in recognizing a forged instrument as genuine, is binding only when the forgery is such that it ought to have been detected by a bare inspection of the instrument. — Rm.

**TOWNSEND, appellant, v. BOARD OF WATER COMMISSIONERS.**

(33 Ill. 22.)

*Promissory note — failure of consideration.*

The consideration of a promissory note was the ice to be formed on certain ponds during the winter. *Held*, that it was no defense to an action on the note that no ice of any value was formed during the winter, and that whatever ice was formed was wholly worthless to defendant.

ACTION by the Board of Water Commissioners against Samuel P. Townsend on a promissory note. The opinion states the case.

*Cullom, Zane & Marcy*, for appellant.

*Robinson, Knapp & Shutt*, for appellees.

SCOTT, J. The record presents but a single question, viz.: did the court err in sustaining the demurrer interposed to the second plea?

The action is founded on a promissory note. In the second plea it is alleged that there was a total failure of the consideration in this, that the note was given for the ice to be formed on the ponds at the reservoir of the appellees, near the city of Springfield, during the winter next following, viz.: the winter ending with the spring of the year 1870, and that no ice of any value was formed upon the ponds during that period, and that whatever ice was formed on the ponds was wholly worthless to the appellant.

It will be observed that it is not alleged that there was any guaranty or warranty that any particular quantity or quality of ice would be formed, or indeed, that any at all would be formed during that period.

It is not denied that some ice was formed during that winter. It was the agreement of the appellant that he would pay the sum of money named in the note, for whatever did form. But it is alleged that whatever ice did form "was wholly worthless" to the appellant.

It is a complete answer to this allegation, that the appellees never promised that the ice that should be formed would be of any value to the appellant. It is doubtless true that all the ice that would make on the ponds during any winter, would be worthless to some persons; still to persons in that line of business it would be valuable. It does not follow that because the ice that did make was worthless to the appellant, it was not, nevertheless, a valuable article of merchandise.

But if the facts set up in the plea were well pleaded, we do not think they would constitute any defense to the note. The appellant was bound to know, and did know, that in this latitude, during some winters, a good deal of ice would make, and in others but very little. With this knowledge on his part, he deliberately elected to pay so much money for whatever ice would be formed during that period, be the quantity great or small, or the quality good or inferior, and no reason is perceived why he should not be bound by his agreement, in the absence of any warranty or fraudulent practices on the part of the appellees.

It is not a subject of inquiry whether the contract was wise or unwise on the part of the appellant, or whether it was profitable or unprofitable. It is enough to know that the contract was fairly made in reference to a subject about which it was lawful for the parties to contract.

The cases cited by counsel for appellant, supposed to be illustrative of the one at bar, are not analogous. In those cases the subject-matter of the contract between the parties was supposed to be in existence at the time, but when it was ascertained that the property was not in existence, it was held that there was a failure of the consideration.

The demurrer was properly sustained and the judgment is affirmed.

*Judgment affirmed.*

WALMSLEY, plaintiff in error, v. ROBINSON.

(68 ILL. 41.)

*Breach of promise of marriage—proof of promise. Evidence.*

In an action for breach of promise of marriage, the judge charged the jury: "In this suit the jury may infer a promise to marry to have been made by defendant, first, from the conduct of the parties; second, from the circumstances which usually attend an engagement to marry, as visiting, the understanding of friends and relatives, preparations for marriage, and the reception of defendant by the family of plaintiff as a suitor." *Held*, error. It does not follow that because a man is the suitor of a lady and visits her frequently, a marriage engagement exists.

In an action for breach of promise of marriage, *held*, that plaintiff's sister could not testify that plaintiff had told her in the absence of defendant about the engagement.

ACTION brought by Sarah Robinson against Merriman W. Walmsley to recover damages for breach of promise of marriage. The opinion states the case.

*Rowell & Hamilton*, for plaintiff in error.

*Hughes & McCart*, for defendant in error.

BREESE, J. This was an action of assumpsit, to recover damages for an alleged breach of marriage contract.

Among the witnesses for the plaintiff was her sister Libbie, who was permitted to testify, against the objections of the defendant, what the plaintiff had told her about a marriage engagement between her and the defendant, and this in the absence of the defendant.

This testimony should not have been admitted; it was hearsay, and therefore objectionable. A party cannot make testimony for himself to be given to the jury through the lips of another.

The eighth instruction given for the plaintiff was excepted to by the defendant. It was this:

"In this suit the jury may infer a promise to marry to have been made by the defendant: 1st—from the conduct of the parties: 2d—from the circumstances which usually attend an engage-

ment to marry, as visiting, the understanding of friends and relatives, preparations for marriage, and the reception of the defendant by the family of Sarah Robinson as a suitor."

We think this instruction is too broad ; it gives the jury a latitude too great. It by no means follows, because a gentleman is the suitor of a lady, and visits her frequently, that a marriage engagement exists between them. If this were so, it would be dangerous for an unmarried man to pay attention to an unmarried woman. Juries always lean toward the woman, and no man would be safe from the contrivances of an artful and designing female whose company might please him. We think the instruction should not have been given.

For the errors noticed, the judgment is reversed and the cause remanded for a new trial.

*Judgment reversed.*

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PADDOCK, appellant, v. ROBINSON.

(83 ILL. 93.)

*Promise of marriage — when void.*

A promise of marriage made at a time when both parties were married and known to be so, by each other, *held* invalid. (See note, p. 113.)

ACTION by Catharine Robinson against Sylvester Paddock for breach of promise of marriage. The opinion states the case.

*Pollard & Phillips*, and *H. E. Dummer*, for appellant.

*Ketcham & Gridley*, for appellee.

LAWRENCE, C. J. This was an action for a breach of promise of marriage. On the trial, the court, against the objection of defendant, permitted the plaintiff to prove promises of marriage made at a time when both parties were married and known to be so by each other. We cannot understand how an action can be maintained on such a promise. It cannot be performed except upon the death or divorce of the husband of the one party, and

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the wife of the other; and to hold that it is valid because it may be performed in such a contingency, would be to introduce into social life a dangerous and immoral principle. Only in the most corrupt condition of society could such agreements be tolerated as lawful. They are, in themselves, a violation of marital duty, and the persons who make them are morally unfaithful to the marriage tie. A contract so deeply at war with the best interests of social life, and which can neither be proposed on the one side nor listened to on the other without a consciousness of moral wrong—a contract, too, incapable of performance except upon a contingency so remote as not to be expected, and which it is a sin to anticipate for such a purpose—such a contract should certainly not be recognized as valid in a court of justice.

We find no case in which this question has been expressly decided. Counsel for appellee cites *Chitty on Contracts*, 587, where it is said that the promise of a married man to marry within a reasonable time is not void, although he was married at the time of making such promise, because his wife might have died within such reasonable time. But on examining the authorities on which the text is based, and which are cited by the author, namely, *Wild v. Harris*, 7 C. B. 999, and *Millward v. Littlewood*, 5 Exch. 775, we find, in both cases, the plaintiff was not aware that the defendant had a wife living at the time of making the promise. The same was true in *Daniel v. Bowles*, 2 C. & P. 553. We fully concur in these decisions. The plaintiff was an innocent party. She did not know she was listening to immoral professions or accepting a promise which the promisor had no right to make. In such cases, courts may well hold that the promisor cannot avail himself of his fraudulent concealment of his marriage as a defense to an action upon the contract. In the case before us, neither party was innocent. Both knew their contract of marriage was essentially immoral.

For the error in permitting the plaintiff to prove the promises of marriage made while the plaintiff's husband and the defendant's wife were living, and known to be so by both parties, the judgment must be reversed and the cause remanded.

*Judgment reversed.*

NOTE.—In *Cover v. Davenport*, 3 Am. Rep. 706 (1 Heisk. 365), and in *Kelly v. Riley*, 6 Am. Rep. 336 (106 Mass. 339), it was held that an action could be maintained for the breach of a promise to marry, although the defendant was married at the time the promise was made, provided the plaintiff was ignorant thereof. — REP.

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Chicago, Burlington and Quincy Railroad Co. v. Dickson.

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**CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, appellants, v. DICKSON.**

(88 ILL. 151.)

*Master and servant — injuries to third person by servant's malicious acts.*

Defendant's engineman wantonly and maliciously sounded the locomotive whistle, so as to frighten the horses of plaintiff, whereby he was injured. *Held*, that defendant was liable.

ACTION by Uriah W. Dickson, against The Chicago, Burlington & Quincy Railroad Company to recover damages for injuries to plaintiff, caused by the wanton and malicious misconduct of defendant's servants. The opinion states the case.

*S. Corning Judd*, for appellant.

*Shope & Gray*, for appellee.

WALKER, J. This was an action on the case by appellee against appellant to recover damages for injuries sustained, as it is claimed, for the wanton and malicious misconduct of the employees of the company. It appears that appellee was entering the village of Prairie City in a two-horse buggy. The road upon which he was traveling was parallel with and near to the railroad track. After he had passed the whistling post a short distance a passenger train came up the track in his rear, going in the same direction he was traveling in his buggy. On arriving at the whistling post witnesses for appellee testified that the engine driver gave the usual sound of the whistle, and, after it had stopped, he again commenced to whistle, with short, sharp and shrill sounds, which alarmed appellee's horses; they commenced to run and became unmanageable from fright, and upset his buggy, which was broken, threw him and his wife out, and he was seriously and permanently injured.

On the trial in the court below, the jury found a verdict for appellee and assessed his damages at \$1,000. Upon which the court below, after overruling a motion for a new trial, rendered judgment, and the company bring the record to this court by appeal, and ask a reversal.

In the case of the *Toledo, Wabash and Western Railway Co. v. Harrison*, 47 Ill. 298, this court held that, where the servants of a railway company, whilst in the discharge of their duties, perverted the appliances of the company to wanton and malicious purposes, to the injury of others, the company would be liable for resulting injuries. In that case it was claimed, and the jury found that the engine driver wantonly or negligently permitted steam to escape just as the plaintiff was crossing the railroad track, so as to frighten his team, which ran and injured him, and that was held to render the company liable for the injury. So in this case it is averred, and the jury have found, that the whistle was wantonly and maliciously sounded so as to frighten appellee's horses, whereby the injury was sustained. And if the verdict is sustained by the evidence, that case must control this.

Appellant's horses did not become frightened by the usual and proper signal given at the whistling post. It was the unusual, short, sharp and shrill sounds of the whistle which alarmed and caused them to run. The evidence clearly shows that there was nothing on the track that required such a sound of the whistle; and the evidence of the appellee shows that the sound was the alarm used to frighten stock, and not such as is usually employed as the warning at a road crossing, or on approaching a station. Appellee's witnesses testify that it was unusually energetic and harsh, and highly calculated to alarm stock. When we can see that there was nothing in front of the train on the track requiring such an alarm, and when the ordinary sound of the whistle or the ringing of the bell would fully have complied with the requirements of the law, and there was no necessity for such an alarm as was given, and when all of the evidence is considered, although it was conflicting, we are of the opinion that the jury was warranted in finding that the conduct of the employees of the road was wanton.

The servants of the road have no right, under the pretext of complying with the law, to recklessly or maliciously inflict such injuries. They must have seen, if the witnesses of appellee are to be regarded, that the sounds had frightened appellee's horses, and instead of stopping the whistle and ringing the bell, they continued the alarm until the carriage was overturned and the injury inflicted. A reasonable regard for the safety of appellee and his wife, on principles of humanity as well as legal obligation, required

the servants of the company, when they saw the alarm of the horses, to have ceased whistling in this extraordinary mode; but, on the contrary, it seems to have been needlessly and recklessly continued. Persons cannot be permitted to inflict such injuries under the pretext that they were complying with the statute, when the ringing of the bell, which would almost certainly have been attended with no danger to appellee, must have been a full compliance with the requirements of the statute. Had it been necessary to alarm persons or stock on the track, then such sounding of the whistle would have been not only proper but necessary. But appellee was not on the track and the engine driver knew he could not get upon it, because, if for no other reason, he was prevented, as we understand it, by the fence between him and the track.

These acts, the jury have found, were done, and there is no evidence in the record showing their necessity. And in all of the conflict of the evidence it was for the jury to find the facts; and the jury were, we think, warranted in finding recklessness or malicious conduct on the part of the employees of the road. It was the province of the jury to weigh and consider this conflicting evidence, and reconcile it as far as they could, and if unable to do so, then to find a verdict according to the preponderance of all the evidence in the case.

This they have done, and, so far as we can see, fairly, and with the result we are not dissatisfied.

It is not mere numbers of witnesses that should control, but a variety of considerations enter into the determination as to where the weight lies. Of these are intelligence, fairness and means of information, and corroborating circumstances, which are more immediately under the observation of the circuit judge and jury than of this court, as we neither see nor hear the witnesses testify.

It is also urged that the court below erred in giving instructions for appellee. His second, sixth and eighth instructions do not state the rule of comparative negligence correctly. But a careful examination of the evidence in the record fails to show that appellee was guilty of any negligence. It is said he should have stopped when he approached the railroad, and listened to ascertain whether a train was approaching. We fail to see how this could have been negligence; he was not intending to cross the railroad track, and was driving a gentle team, as the proof shows, accustomed to engines and trains, and had no reason to believe, if a train did pass, that



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such unusual sounds would be made by which his team would become alarmed. He only acted, as it seems to us, as any prudent man would have done under the circumstances.

Appellee, then, being chargeable with no negligence, these instructions could not have misled the jury, as there was no negligence on his part to compare with that of appellant. Hence they could not have injured appellant. And a careful examination of appellant's instructions fails to show that the court erred in refusing those not given, or in modifying a portion of those that were given. To have given them without modification would have announced to the jury incorrect rules of law well calculated to mislead to an erroneous verdict. The law was fairly given to the jury for appellant by its instructions. Nor do we see that the verdict is excessive; and the court below acted properly in refusing to set it aside.

Perceiving no error in the record requiring a reversal, the judgment of the court below is affirmed.

*Judgment affirmed.*

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ALVIS, appellants, v. MORRISON.

(83 ILL. 181.)

*Mortgage — destruction of record — notice to purchaser.*

A mortgage bore an indorsement that it had been recorded; but the record book had been destroyed by fire. *Held*, that the mortgage was the highest evidence of the lien on the premises covered by it, and warranted a judgment of foreclosure.

Where the record book of a mortgage is burned, the index and file books furnish notice, to a subsequent purchaser, of the existence of the mortgage. (See note, p. 120.)

APPEAL from the Circuit Court of Logan county. The opinion states the case.

*Wm. McGalliard, James T. Hoblett, Wm. B. Jones, and Stuart, Edwards & Brown*, for appellants.

*Williams & Burr*, for appellees.

THORNTON, J. One party claims title to the land in controversy as the guaratee of the purchaser at a sheriff's sale, had by virtue of an execution issued upon a judgment rendered upon the foreclosure of a mortgage by *scire facias*, in pursuance of the statute. The record of the mortgage was burned before foreclosure, but the mortgage was preserved.

The other party claims title as a purchaser subsequent to the destruction of the record.

There was, upon the mortgage, the usual indorsement that it had been filed and recorded, which was signed by the recorder. There were also preserved from the wreck of the fire an index and a file book, in which was given the name of the mortgagor and mortgagee, a description of the premises, the date of the deed and the date of the record.

The position assumed is that there was no record of the mortgage at the time of the foreclosure, and as there was no record, there could be no foreclosure.

The assumption is false in fact and in law. The mortgage, with the indorsement upon it of a registration, was a sufficient record for the action of the court. It was the evidence contemplated by the statute when it authorized the mortgagee to sue out a writ of *scire facias*, "if default be made in the payment of any sum of money secured by mortgage on lands and tenements, duly executed and recorded." It was the best evidence, and the record could not have been introduced unless upon the due proof of loss of the original.

When the mortgage, duly executed and recorded, was exhibited to the court, together with the note intended to be secured, it had the highest evidence required by the law, and was bound to act upon it; and the assumption that the judgment was void, is unsupported either by reason or authority.

The cases cited by appellees upon this point are direct authorities against them. In *Woodbury v. Manlove*, 14 Ill. 213, it is said that the plaintiffs fully sustained the case on their part by the production of the mortgage, duly acknowledged and recorded. In *Russel v. Brown*, 41 Ill. 183, it is said, "on a *scire facias* the mortgage is treated as a record, and the court must follow it." Again, in *Carpenter v. Mooers*, 26 Ill. 162, this language is used: "The mortgage, being recorded, is treated as a record, importing absolute verity."

The fallacy in the argument is the result of the supposition that

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the foreclosure by *scire facias* is based upon the record alone, whereas it is upon the mortgage duly executed and recorded, and the court was bound to render the judgment upon the production of the latter.

The court, then, had jurisdiction of the subject-matter (Scates' Comp. 976, § 23), and also of the parties, for the writ was properly executed. The defau't admitted the necessary averments in the writ. The sale was regular, and the purchase made in good faith. The guarantee of the purchasers at a sheriff's sale is also an innocent purchaser, and paid a valuable consideration. It would be a monstrous doctrine to hold that such a judgment and sale are void. The effect would be ruinous, and the purchasers at judicial sales would have no protection.

The record of the deed, made subsequent to the record of the mortgage, was no notice either to the prior mortgagee or to the purchaser at a judicial sale. The registry laws have no application in such case. The record of the subsequent deed was not even constructive notice to the purchasers. No one but the mortgagor, or in case of his death, his executors or administrators, were necessary defendants. Subsequent purchasers are not required to be made parties in proceedings to foreclosure by *scire facias*, but must take notice of them. *Chickering v. Fails*, 26 Ill. 507; *Matteson v. Thomas*, 41 id. 110.

But what was the object of the record of the mortgage? It was good between the parties without record, but it could not take effect and be in force as to subsequent purchasers unless recorded, or there was actual notice. The object of recording was to afford notice to subsequent purchasers. Scates' Comp. 969, § 23.

The proof shows that they had sufficient notice. Within a month after the fire they obtained the deed, under which they now claim title. This deed recites that it was made in lieu of deeds destroyed by the fire, and that one of them was dated in 1852. This date is subsequent to the record of the mortgage. In the index, which was preserved from the fire, is contained an entry of a deed, from the mortgagor to these subsequent purchasers of the same land, and dated in 1852.

The mortgage was then recorded, and the record was at that time, at all events, constructive notice to the purchasers. They then had knowledge of it. Did the burning efface such knowledge and render ineffectual the notice which had been complete? A mort-

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gage is recorded to-day, and takes effect and is in force as to all subsequent purchasers from the fact of record. A third party, to-morrow, purchases the mortgaged land, receives a deed and places it upon record. On the next day the records are burned. Does this burning destroy the notice which had been given to the purchaser, and the knowledge which he had acquired? Such a conclusion is preposterous.

It must also be apparent that the index and file book afforded notice of the existence of the mortgage, or that the mortgagee had some claim upon the land. The statute requires the recorder to keep such books in his office. Scates' Comp. 967, § 7. Upon the destruction of the principal records, these books were still notice of the entries made in them.

The objection to the form of the acknowledgment is not well taken. The conclusion is inevitable, from the language used, that the acknowledgment was made before the officer. The precise language of the statute need not be used.

Upon the whole case, we are of opinion that the proceeding to foreclose by *scire facias* was right, and that Baker, the grantee of the purchasers at the judicial sale, is an innocent purchaser, and entitled to protection. His deed must be regarded as paramount.

The decree of the court, as to the land purchased by Baker, is reversed, and the cause remanded.

*Decree reversed.*

NOTE. — A deed filed for record in a recorder's office and recorded, is notice to subsequent purchasers, notwithstanding the failure of the officer to index it. *Bishop v. Schneider*, 2 Am. Rep. 533 (46 Mo. 473). So the fact that a deed is recorded in the wrong book will not defeat any right the grantee may have as a person "claiming title." *Conklin v. Hinds*, 16 Minn. 437. And after a deed of trust has been duly recorded, the partial or total destruction of the record book containing it does not impair the lien or affect the record of it as legal notice. *Myers v. Buchanan*, 46 Miss. 397. — REP.

### YOCUM, appellant, v. SMITH.

(68 Ill. 381.)

*Promissory note — alteration by filling up blanks.*

A negotiable promissory note for \$300 was altered to \$320 by filling up a blank left by the maker. *Held*, that the maker was liable to a *bona fide* holder for the amount of the note in its altered form. (See note, p. 122.)

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Yocum v. Smith.

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**ACTION** brought by John T. Smith against George W. Yocum on a promissory note. The note was made by defendant for the sum of \$300, payable to the order of one Barbour. When plaintiff took the note it was for the amount of \$320. It appeared that the alteration had been made by filling up a blank after its execution and delivery. Plaintiff obtained judgment for the amount of \$320 and interest. A new trial was denied and defendant appealed.

*Herndon & Orendorff*, for appellant.

*Stuart, Edwards & Brown*, for appellee.

THORNTON, J. The note in suit was purchased in good faith by the holder before maturity, and was duly indorsed to him. When the note was signed, a blank space was left between the words "hundred" and "dollars," which, it is claimed, was filled by adding the words "and twenty." Experts testified that the note was all in the same handwriting, except the signature, and that there was no appearance which would cause a prudent man to suppose that it had been altered. The original note has been sent up with the record, and there is nothing upon the face of it to indicate that there had been any alteration.

The purchaser was a *bona fide* holder of the note. It was indorsed to him for value, in the usual course of business, and without notice of any equities between the antecedent parties. It was in form perfect, without any indications of alteration, and was current negotiable paper. There was nothing to induce the belief that there was any infirmity about it, and no proof of bad faith in the holder.

Bills of exchange and promissory notes are commercial paper, and are regarded with favor, on account of their general convenience in mercantile affairs. To impeach the title of the purchaser of such paper, more proof should be offered than was submitted in this case.

The rule established by the authorities is, that the *bona fide* holder of negotiable paper, indorsed before maturity for value, and without notice of facts which might affect its validity between the antecedent parties, takes it unaffected by facts which might render it invalid between the original parties. *Swift v. Lyson*, 16 Peters, 1; *Goodman v. Simonds*, 20 How. (U. S.) 343; *Goodman v. Harvey*, 4 Ad. & Ellis, 869.

An exception would exist, under our statute, where the note was obtained by fraud and circumvention.

*Taylor v. Atchison* 54 Ill. 196 (5 Am. Rep. 118), is referred to to sustain the position that the purchaser was at fault, and did not use proper diligence in buying of a stranger and a seller of patent rights without inquiry of the maker. There is no proof that the immediate indorser was a stranger to the purchaser, or that the latter knew the indorsers were dealing in patent rights, or that the holder had any knowledge that the consideration of the note was connected with a patent right. Therefore the case cited has no application. The purchaser is not required to inquire in regard to a matter of which he has not been informed, and about which he was not put upon his guard.

But the maker of the note acted with unpardonable negligence in signing the same and leaving a blank which could so easily be filled, and thus the amount of the note be increased. He knew the party to whom the note was given; that it would almost certainly be put in circulation; and he was informed, by letter, very soon after the date of the note, by the purchaser, that he had bought it, and of its date and amount; and yet no objection is heard as to the amount of the note for nearly one year.

If the note had been altered, the maker has acted with too gross carelessness to be entitled to protection. The purchaser is entirely innocent, and not even a suspicion of his good faith is created—nothing to show that he had any notice of any thing wrong. The maker placed it in the power of another to do an injury, and if any loss result, he must suffer who is the cause of it.

If the negligence of one influences and induces an act whereby an innocent man is injured, the culpable party must sustain the loss. *Harvey v. Smith*, 55 Ill. 224; *Young v. Grote*, 4 Bing. 253; *Pagan v. Wylis*, 1 Ross Lead. Cases, 140; *Garrard v. Hadden*, 67 Penn. St. 82 (5 Am. Rep. 412).

In this case, when the maker put the note in circulation, it was an invitation to the public to purchase it from the holder, with apparent title. The alteration could not be detected, and the maker is estopped from urging his defense.

The judgment is affirmed.

*Judgment affirmed.*

HEFNER, appellant, v. DAWSON.

(68 Ill. 402.)

*Promissory note — ratification of forgery.*

In an action on a promissory note against a maker whose signature was forged it appeared that defendant had said to plaintiff that the note was "all right," and that if plaintiff would "hold on" he would pay him, thereby inducing plaintiff to omit to collect the note of the other maker, who afterward became insolvent and absconded. *Held*, that defendant was estopped from denying the execution of the note.

ACTION by Samuel Dawson against Marston Hefner upon a promissory note. The opinion states the case.

*Williams & Burr*, for appellant.

*Weldon & Benjamin*, for appellee.

SHELDON, J. This was an action of assumpsit, brought by appellee against appellant, upon a promissory note purporting to have been made by appellant and one Coman.

Appellant, by plea verified by affidavit, denied the execution of the note; the cause was tried by the court without the intervention of a jury, and judgment rendered against the defendant, from which he prosecutes this appeal. It is not claimed that appellant did make this note, but it is contended that, by his acts and admissions, he is concluded from denying that fact.

This case, in its main features, is much like the one of *Hefner v. Vandolah, ante*, p. 106, except that there is more in the conduct of the defendant, and the circumstances in the present case as testified to, which partakes of the character of an estoppel *in pais*, than there was in the former one, and there is a conflict of testimony here which did not there exist.

There was evidence in the present case which went to show, and would sustain the finding of the court to that effect, that the defendant not only adopted and ratified the signature of his name upon the note, but that, by his admissions and declarations that the note was "all right," and that if plaintiff would "hold still" he would pay him, he knowingly and designedly induced the plaintiff to omit taking any measures to collect the note of Coman, at the time when the latter had ample property in his hands, and a

resort to whom for the collection of the note would, in all probability, have been successful; and that afterward, while the plaintiff continued to be misled by the assurances of the defendant, Coman failed in business and absconded, rendering the collection of the note from him impossible.

Without repeating what was said in the former case referred to, as to such adoption and ratification by Hefner of the use of his name upon the note being sufficient to charge him with liability, although his signature was forged, we refer to the authorities therein cited in support of that position, and, in addition, to the following authorities, that, under the foregoing state of facts, the defendant would be precluded from contesting the genuineness of his signature to the note. *Hefner v. Vandolah*, ante, 106; *Smith v. Newton*, 38 Ill. 335; *Freeman v. Cook*, 2 Exch. 654; *Kingsley v. Vernon*, 4 Sandf. S. C. 361.

It is true, the evidence was conflicting, and the above was only one phase of the testimony, but we perceive no sufficient reason for disturbing the finding of the court.

As to the point made, that the check of \$350 paid by Hefner should have been allowed, we understand from the amount of the judgment that it must have been allowed by the court as a payment on the note.

As to any question of usury, there is no plea of usury, and the evidence fails to show any agreement for usurious interest.

The judgment of the court below must be affirmed.

*Judgment affirmed.*

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HAYNER, appellant, v. SMITH.

(63 Ill. 430.)

*Landlord and tenant — what constitutes eviction.*

In an action for rent, it appeared that the landlord had taken possession of a part of the demised premises. *Held*, that this was an act of trespass, or eviction, according to the intention with which it was done, and if the jury should find it to be an eviction, the tenant was released from the payment of rent accruing after the eviction.



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Hayner v. Smith.

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ACTION by John H. Smith and wife, against John E. Hayner *et al.*, to recover rent alleged to be due on certain premises. The opinion states the case.

*Charles P. Wise*, for appellants.

*William S. Field*, for appellees.

BRESEE, J. This was an action originally brought before a justice of the peace in Alton, in the county of Madison, by John H. Smith and Elizabeth Smith, against appellants, to recover the monthly rent claimed to be due on a written lease executed by Elizabeth Smith to appellants.

The judgment by the justice of the peace was in favor of the plaintiffs, from which the defendants appealed to the Alton city court, where a like judgment was rendered. To reverse this judgment the defendants appealed to this court.

The first point made by appellants is, that the lease was executed by Elizabeth Smith to appellants' assignors, and she alone should have brought the action. This point is well taken, for, although John H. Smith may be the husband of Elizabeth, and was so at the time of executing the lease, he did not sign it, nor was the ownership of the property in him. It was in his wife in her own right. No joint cause of action was established, and there was no undertaking to pay rent to the plaintiffs. There was, therefore, a variance between the cause of action and the evidence. It was payable to Elizabeth Smith in her own right, and she alone must sue. *Emerson v. Clayton*, 33 Ill. 497; *C. B. and Q. R. R. Co. v. Brown*, 51 id. 206.

The very object and purpose of the act of 1861, commonly called the "Married Woman's Act," would be defeated, should the husband join in an action to recover the property of the wife, for in such case he could control the recovery and deprive the wife of its enjoyment. This disposes of the case, and must reverse the judgment.

It is suggested that another action may be brought by the proper party, and it is desired this court should state the principles which should govern it.

The defense to the action was that, after the demise, John H. Smith, who, it is proved, controlled the property for the lessor, took

possession of a building on the premises erected by the lessees for a drying house, and used it as a stable. and the entire lot as a cattle yard, without the consent of the lessees ; that these acts of the lessor amounted to an eviction, and discharged the lessees from the payment of rent for the unexpired term.

There is a covenant in this lease for the quiet enjoyment of the whole of the demised premises ; but if there was not such a covenant, such enjoyment, without any protestation by the landlord, would be implied in the condition on which the tenant is bound to pay the rent. The law implies covenants against such acts of the landlord as destroy the beneficial enjoyment of the premises leased. *Wade v. Halligan*, 16 Ill. 507. Forcible expulsion of the tenant is, of course, an eviction, and may terminate the tenancy.

There is much diversity of opinion in the books on the question of a constructive eviction and the consequences flowing from it. Some courts have held that an actual eviction of the lessee by a title paramount, or by the lessor himself, would alone justify the lessee in resisting the payment of rent, whilst other courts go further, and hold that an eviction from a part of the leased premises by the act of the landlord will justify the tenant in abandoning the premises, and thus discharge himself from liability for rent; and other equally reputable courts have said that any act of the lessor which defeats the enjoyment of the entire property by the lessee, though he may continue in possession of the part not intruded upon by the lessor, would be a bar to the recovery of the rent. It is unnecessary to collate these authorities ; it is sufficient to say they are not entirely harmonious.

In a case similar to this in all respects, between the same parties, before this court at a former term, in disposing of the instructions given in that case, the second, given on behalf of the lessees, defendants, to this effect, was held to be proper. The principle upon which a tenant is required to pay rent is the beneficial enjoyment of the premises unmolested in any way by the landlord; and if the jury believe from the evidence that the plaintiff took possession of any part of the premises leased by her to the defendants, against their consent, then in law it is an eviction, and releases the defendants from the payment of any more rent, and they will find for the defendants. The fourth and seventh instructions were substantially the same.

In addition to the authorities cited in that case, *Briggs v. Hall*,

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Hayner v. Smith.

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4 Leigh (Va.), 484, may be referred to. In that case a farm was let for one year, and the landlord entered on a meadow, parcel of the premises, within the year, and cut and carried away the hay without the consent and against the will of the tenant, who, nevertheless, continued to occupy the farm during the residue of the year. It was held, the landlord, by such disturbance of the tenant, lost the benefit of the entire contract, and was not entitled to recover any part of the rent. A reference is made to *Smith v. Raleigh*, 3 Camb. 553, in which Lord ELLENBOROUGH said, "An eviction from the part of the demised premises is a complete answer to the action."

In *Dyatt v. Pendleton*, 8 Cow. 727, the court of errors of New York recognize a distinction found in the books where an eviction is by a third person, or by the landlord. A legal eviction of the tenant by a third person excuses the payment of rent — so does any eviction by the lessor. If the eviction be partial, by a third person, the rent will be apportioned, but a partial eviction by the lessor excuses from the payment of the whole rent.

The principle is, that a party who deprives another of the consideration upon which his obligation is founded cannot, in general, recover for a violation of that obligation.

In *Leishman v. White et al.*, 1 Allen (Mass.), 489, which was an action for use and occupation of a tenement hired by the defendants to the plaintiff, as set out in the first count of the declaration, and in another count, a lease was set out by which plaintiff leased to the defendants a hotel near Spot Pond, with the lands adjoining, and an island in the pond, for five years, at the yearly rent of two hundred and fifty dollars, payable quarterly.

The defendants, among other things, set forth in their answer an eviction by the lessor from a portion of the premises. Evidence offered on the trial, to show the defendants were evicted from a part of the premises, was refused, the court holding that such eviction, if proved, would only bar the plaintiff's claim *pro tanto*, and that he might still recover a proportionate share of the rent according to the ratable value of the portion of the premises from which the defendants were not evicted.

On appeal to the Supreme Court, it was held, the action could not be maintained, if the defendants proved they had been evicted from a part of the demised premises by the plaintiff. The court say: "In such case, no recovery can be had on the covenant to

pay rent, because the defendant has been deprived of the beneficial enjoyment of a portion of the estate by the tortious act of the lessor, and the covenant, being entire, cannot be severed or apportioned so as to allow the plaintiff to recover a part of the rent reserved by the lease."

The same doctrine was held by the same court in *Shumway v. Collins*, 6 Gray, 232.

In *Christopher, Exr., v. Austin*, 1 Kern. (N. Y.) 216, it was said: "A wrongful eviction by the landlord from a part of the demised premises suspends the rent until the possession is restored, and the landlord cannot recover a portion of the rent agreed upon or any compensation for the part of the premises occupied by the tenant while the eviction continued."

Further reflection and a close examination of authorities have satisfied us that these instructions require some modification.

As was said by the Court of Common Pleas, by JERVIS, Lord Chief Justice, in *Upton v. Townsend*, 84 Eng. C. L. 30, and *Same v. Greenleaf*, id: "It is extremely difficult, at the present day, to define with technical accuracy what is an eviction. The word eviction was formerly used to denote an expulsion by the assertion of a title paramount, and by process of law. But that sort of an 'eviction' is not necessary to constitute a suspension of the rent, because it is now well settled that, if the tenant loses the benefit of the enjoyment of any portion of the demised premises by the act of the landlord, the rent is hereby suspended. The term 'eviction' is now popularly applied to every class of expulsion or amotion." This eminent judge further says: "I think it may now be taken to mean this — not a mere trespass and nothing more, but something of a grave and permanent character done by the landlord with the intention of depriving the tenant of the enjoyment of the demised premises." The question, therefore, of eviction or no eviction depends upon the circumstances, and is in all cases to be decided by the jury.

WILLIAMS, J., in the same case, in delivering his opinion, said: "Considering how frequently transactions of this sort are taking place, it is somewhat remarkable that so little is to be found in the books upon the subject of eviction. There clearly are some acts of interference by the landlord with the tenant's enjoyment of the premises which do not amount to an eviction, but which may be either acts of trespass or eviction, according to the intention with

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Hayner v. Smith.

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which they are done. If those acts amount to a clear indication of intention on the landlord's part that the tenant shall no longer continue to hold the premises, they would constitute an eviction."

We are inclined to think the rule is announced in these cases last cited. The court below will so give instructions in the case as shall conform to it, on the trial of another action brought by the proper party.

For the reasons given, the judgment of the court below is reversed.

*Judgment reversed.*

‘CASES  
IN THE  
SUPREME COURT OF APPEALS  
OF  
VIRGINIA.

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GREENE, appellant, v. ADAMS.

(28 Gratt. 225.)

*Usury — contract when not usurious.*

A builder contracted to build houses for \$54,700, payable in annual installments, to bear interest at 7.80 per cent. The legal rate of interest was six per cent. *Held*, that if the interest was a part of the contract price of the houses, the contract was not usurious.

APPEAL from a decree of the Chancery Court of the city of Richmond. The opinion states the case.

*Lyons & Sterne, John Howard and Meredith, for appellant.*

*Johnston & Williams and Steger, for appellees.*

BOULDIN, J. This is an appeal from a decree of the Chancery Court of the city of Richmond, dissolving an injunction which had been awarded the testator of the appellant, and dismissing his bill with costs.

The bill charged that the transaction therein referred to was usurious, and prayed that the question might be tried by a jury; and,

on motion of the plaintiff, a jury was impaneled to try at the bar of the court, "the issue, whether the transaction in the said bill alleged to be usurious be usurious or no." The trial of the issue was regularly had at the bar of the court; and on the 21st day of November, 1870, the jury rendered a verdict in the following words: "We, the jury, find that the transaction in said bill alleged is not usurious." On the jury being polled, one of the jurors said that the verdict rendered was his verdict, "under the instructions of the court;" all the others as respectively called, said it was their verdict.

The plaintiff thereupon moved the court to set aside the verdict, and order a new trial of the issue; which motion was continued. On a subsequent day, to wit: on the 21st of December, 1870, the court overruled the motion for a new trial; and the evidence being conflicting, refused to certify the facts proved on the trial of the issue; to which opinion and action of the court the plaintiff excepted.

On the same day the court, approving the verdict of the jury, entered a decree dissolving the injunction which had been awarded in the cause, and dismissing the plaintiff's bill with costs; and from that decree Græme appealed to this court.

The Chancery Court having refused, and we think properly refused, to certify the facts proved on the trial of the issue, because the evidence was conflicting, no question of fact is presented for the consideration of this court. We cannot inquire whether the finding of the jury is sustained by the evidence or not. The only question before us is, whether the Chancery Court in giving or refusing to give instructions to the jury, or in opinions expressed in the progress of the trial, erred in propounding the law of the case.

It is contended for the appellant, that the court did err, 1. In refusing to give the instructions moved by appellant; 2. In giving other and different instructions in lieu thereof. The questions arose as follows:

There was evidence in the cause showing, or tending to show, the following facts: That in July, 1865, an agreement was entered into between John Græme and S. H. and J. F. Adams, by which the latter agreed to build for the former certain houses in the city of Richmond, according to plans and specifications, for the lumping sum of \$54,700, payable in annual installments of \$12,000. to

bear interest at the rate of 7.30 per cent per annum, and to be secured by a deed of trust on the property; that afterward, to wit: on the 18th of November, 1865, a new contract was entered into between the parties, by which the contract price of the buildings was changed from \$54,700 to the sum of \$57,800, to be paid in like annual installments of \$12,000, but bearing only six per cent interest instead of 7.30; that the sum of \$3,100, the difference between the contract price of July, 1865, and that of November, 1865, was the precise amount of the difference between the interest on the first contract price at 7.30 and the interest on the same sum at six per cent; that in the progress of the work, extra work, to a considerable amount, had been done, for which a balance of \$2,200 was claimed as unpaid, in addition to the contract price; that on a final settlement between the parties, when the buildings were completed, the Adams claimed of Græme \$61,000; that Græme offered to settle at the lumping sum of \$60,000, which was promptly accepted; and that the sum of \$57,800, mentioned in the contract of November, 1865, and the balance claimed for extra work, \$2,200, would amount to the exact sum of \$60,000, offered by Græme and accepted by the Adams; and that the same amount would be reached by taking the first contract price, \$54,700, and adding thereto \$3,100, the difference between 7.30 and six per cent, and the \$2,200 claimed for extra work.

The plaintiff's counsel then asked the court to instruct the jury as follows:

"1. If from the evidence the jury shall believe that the defendant contracted to build the houses of the plaintiff upon the terms of credit, the payments to bear interest at the rate of 7.30 per cent, such contract was usurious, although the defendant was ignorant at the time that it was usurious.

"2. If the defendants set up a new contract subsequently made, and seek to recover upon that contract, they must prove to the satisfaction of the jury that such new contract was made and accepted by both parties; and that all the usury in the first contract was excluded from it, and no new usurious considerations included in it.

"3. That if the defendant, in making the new contract, knowingly included in it any sum of money over and above the true contract price of the work, as a compensation to him for loss of interest, then the said new contract is usurious."



## Græme v. Adams.

"4. The question of fraud is not in issue before the jury. That issue is, was the transaction usurious or not? and if the jury shall be of opinion, from the evidence, that it was usurious, then it is void, whether it be fraudulent or not."

"5. To constitute a new contract, the jury must be satisfied that the first contract was abandoned and surrendered by the parties thereto, and that the contract of the 18th of November, 1865, was executed and delivered by said parties as a substitute therefor. But if the jury shall believe that said contract of November, 1865, was intended by said parties to be a modification of the first contract, and made to assure its performance, then it is not a new contract."

"6. If from the evidence the jury shall believe that upon the final settlement of the accounts between John Græme and S. H. and J. F. Adams, the balance stated was made up of the contract price for the work and the price of extra work done by the Adams (after crediting payments for extra work), and a sum of \$3,100; which sum was the exact amount of the usurious interest upon the contract price for the whole term of credit, at the rate of 7.30 per cent per annum, and for the balance thus ascertained, the said Græme executed his negotiable notes with interest at the rate of *six per cent per annum*, then the transaction was usurious, and the jury must find for the plaintiff."

"7. A loan or forbearance of money to be paid at a future day for more than *six per cent* is usurious: and if, therefore, the jury shall be satisfied by the evidence, that the defendants charged the plaintiffs more than six per cent for the forbearance of the payment of the buildings, in the manner and to the extent expressed in the notes which were executed by the plaintiff to the defendants, then the transaction is usurious."

The defendants then moved certain instructions, which it is unnecessary to repeat, as no question arises thereon.

The court refused to give the instructions as asked for by the parties respectively, and gave the following:

"1. If from the evidence the jury shall believe that the defendants contracted to build the houses of the complainant Græme upon terms of credit, the payments to bear interest at the rate of 7.30 per cent, in such case the question whether such contract was usurious or not usurious will depend on the further question, whether the reservation of the rate of 7.30 per cent was directly or

indirectly for the loan or forbearance of money or other thing, or whether it was a part of the consideration for building the houses.

"If the jury believe from the evidence that it was for the loan of money or other thing, directly or indirectly, or for the forbearance of a debt due, then such contract was usurious, although the defendants were ignorant at the time that it was usurious.

"On the other hand, if they believe it was part of the consideration for building the houses, a part of the contract price, it was not usurious.

"2. If the defendants set up a new contract subsequently made, and seek to recover on that contract, they must prove to the satisfaction of the jury, that such new contract was made by the complainant and accepted by defendants. And if the jury believe that the first contract was usurious they must be also satisfied that all the usury in the first contract was excluded from such new contract; and that no usurious consideration was included in such new contract."

"3. That if the defendants, in making the new contract, included in it any sum of money over and above what the jury shall find to have been the amount of the true contract price of the work, and that the sum so included in such new contract was intended to be compensation to them for the loss of interest on a loan or for the forbearance of a debt due, and that the interest for such loan or forbearance was at a greater rate than *six per cent per annum*, then such new contract was usurious.

"4. The question of fraud is not in the issue before the jury; that issue is, was the transaction usurious or not? If the jury shall be opinion from the evidence that it was usurious, then it is void, whether it be fraudulent or not.

"5. To constitute a new contract, the jury must be satisfied that the first contract was rescinded and set aside by the parties thereto; and that the contract of the 18th of November, 1865, was executed and delivered by Græme and Hunter and wife, and accepted by the defendants, as a substitute therefor; and that it was the intention of the parties to be governed thereafter by the terms of said second contract.

"6. If from the evidence the jury shall believe that upon the final settlement of accounts between John Græme and S. H. and J. F. Adams, the balance stated was made up of the contract price for the work and the price of extra work done by the Adams (after

crediting payments for the extra work), and a sum of \$3,100 ; and the jury shall find that the sum of \$3,100 was the exact amount of interest upon the contract price for the whole term of the credit, at the rate of 7.30 *per cent per annum* ; and for the balance thus ascertained the said Græme executed his negotiable notes with interest at the rate of *six per cent per annum* ; then, if the jury further believe that the said sum of \$3,100 was for interest for the loan of money or other thing, directly or indirectly, or for the forbearance of a debt due, then such contract was usurious ; but if the jury believe that said sum was not for such loan or forbearance, then the transaction was not usurious."

Add then, at the instance of the plaintiff's counsel, who moved the court to explain the meaning of the word "forbearance," as used in the instructions, the court gave to the jury the following explanation :

"The legislature uses two words," "loan," "forbearance." It did not use those two words in the same sense.

"When the word 'loan' was used, it meant 'a delivery of something to another for his temporary use, which he is to return to its owner at the expiration of his term.' A forbearance is the giving of a day for the return of the loan ; or, more properly, signifies the giving a further day when the time originally agreed on is passed."

"The latter clause of this definition is referred to as more clearly indicating what in the view of the court constitutes a forbearance."

"When the time originally agreed on is passed, and another day is given, that is forbearance ; and if the rate of interest is above *six per cent* it is usurious." "For instance, if A lends B \$100 for three months, at six per cent interest, that is a lawful loan ; if at or before the time the \$100 becomes payable, B cannot pay, and further time is agreed on, that is forbearance ; and if more than *six per cent* is also agreed on, it will be usurious and void."

"When the houses were completed there was a present debt owing by Græme to S. H. and J. F. Adams, payable at a further day. There was no debt until the houses were completed. If there was an agreement to give a further day after the time originally agreed on was or should be passed, then if more than legal interest was charged it was usurious."

"What is the time originally agreed on, and whether or not there was an agreement for a further day, are questions of fact for the jury."

After the case had been argued and submitted to the jury, one of the jury asked the court to state what would be the effect of a tender of the money by the plaintiff to the defendants upon the completion of the buildings erected by the defendants for the plaintiff, and the court said :

" If the contract for the price of the houses was payable in installments bearing interest, that contract could not be discharged by the tender of cash at the time when the buildings were completed."

To all of which opinions, instructions and action of the court, the plaintiff by counsel excepted.

It is insisted for the appellant that the Chancery Court erred in refusing to give the instructions asked for by his counsel, and in giving the instructions which were given by the court.

The instructions thus given seem to cover the whole case ; and, without entering upon a critical examination of the several instructions given and refused by the court, which we deem unnecessary, we are of opinion that the instructions correctly propounded the law of the case, and that there was no error in giving them in lieu of the instructions moved by the plaintiff.

Usury can only attach to a *loan* of money, or to the forbearance of a debt. It is well settled that on a contract to secure the price or value of work and labor done or to be done, or of property sold, the contracting parties may agree upon one price if cash be paid, and upon as large an addition to the cash price as may suit themselves, if credit be given ; and it is wholly immaterial whether the enhanced price be ascertained by the simple addition of a lumping sum to the cash price, or by a percentage thereon. In neither case is the transaction usurious. It is neither a loan nor the forbearance of a debt, but simply the contract price of work and labor done or property sold ; and the difference between cash and credit in such cases, whether six, ten or twenty per cent, must be left exclusively to the contract of the parties ; and no amount of difference fairly agreed on can be considered illegal. It is confounding subjects and terms wholly dissimilar and distinct, to treat such contracts as usurious, as coming within the definition either of a loan of money or other thing, or the forbearance of a debt.

In all cases where property, goods or things in action and the like are *bona fide* sold, or contracts are made for service, instead of for money or other thing *advanced*, the courts hold that usury

cannot attach for the want of a loan. There is, in such case, no element of a loan, nor any forbearance of a debt, in the sense of the statutes. See Tyler on Usury, chaps. 10, 11, pp. 110 to 143, inclusive, where the subject is fully treated and all the authorities cited.

In the case of *Beets v. Bidgood*, 14 Eng. C. L. R. 8, Lord TENTERDEN refers to the distinction we have been considering, and says: "The agreement was founded partly on what was considered its price if paid for at a future day. The only difficulty has been occasioned by calling the difference between these two prices *interest*; but it is our duty to look not at the form and words, but at the substance of the transaction." And he held the contract legal, notwithstanding the increased price given for the credit was called *interest*, and exceeded the legal rate. This addition was regarded a part of the contract price.

The principle thus announced will be found to be fully sustained by the authorities examined and cited by Mr. Tyler in his recent work on Usury, *ubi sup.*; and the same principle has been recognized by this court in the recent case of *Knaker v. Shields*, 20 Gratt. 377. There a sum of money called *interest* was added to the principal of the deferred installments, and bore interest when due as a part of the principal. It was objected to as illegal. The objection was overruled, and the court said: "In fact the interest is part of the *purchase-money of the land*, and in effect is principal;" being thus a part of the purchase-money of the land, and *principal* not *interest*, no amount thus *bona fide* added as principal could make the debt usurious. That addition is, and of necessity must be regulated by the contract of the parties, and not by law. For the same principle see 5 Rob. Prac., page 466-7, and cases cited.

In *Hogg v. Ruffner*, 1 Black. (U. S.) 115, 118, 119, Justice GRIER, delivering the opinion of the court, in an analogous case, says, after referring to *Crawford v. Johnson*, 11 Ind. 258: "But it is manifest that if A propose to sell to B a tract of land for \$10,000 cash, or for \$20,000 payable in ten annual installments, and if B prefers to pay the larger sum to gain time, the contract cannot be called usurious. A vendor may prefer \$100 in hand to double the sum in expectancy, and a purchaser may prefer the greater price with the longer credit; and one who will not distinguish between things that differ may say with apparent truth, that B pays a hundred *per cent* for forbearance; and may assert that such a contract

is usurious. But whatever truth there may be in the premises, the conclusion is manifestly erroneous. Such a contract has none of the characteristics of usury ; it is not for a loan of money or forbearance of a debt."

We think the instructions of the court, touching the question of usury, taken as a whole, are in strict accordance with the principles announced, and there is no error therein.

But the appellant's counsel insist that the sixth instruction of the court is erroneous, unintelligible, and calculated to mislead the jury. We think there is nothing in that instruction of which the appellant has cause to complain. It was based upon evidence in relation to the final settlement between Græme and the Adams, and was given as a substitute for the sixth instruction asked by the appellant ; and, in substance and effect, it merely left it to the jury to determine whether the \$3,100 added to the original contract price of the work was *usurious interest*, or a *part of the contract price* of the buildings. In giving the instructions the Chancery Court used almost identically the words of Judge GRIER in *Hogg v. Ruffner*, defining usury. He says, page 118 : "To constitute usury there must be either a loan and a taking of usurious interest, or the taking of more than legal interest *for the forbearance of a debt or sum of money due*."

The instruction says : "If the jury further believe that the said sum of \$3,100 was for *interest* for the loan of money or other thing, directly or indirectly, *or for the forbearance of a debt due*, then such contract was usurious." The use of these words, "for the forbearance of a debt due," it is contended, renders the instruction ambiguous and unintelligible, and therefore erroneous, as calculated to mislead the jury. We have seen that they are in substance, and almost to the letter, the same used by Judge GRIER in defining usury ; and we are of opinion, as applied to the case before the court, they were appropriate, and not calculated to mislead the jury.

It is further urged that the court below erred in saying to the jury, in reply to a question of a juror, that "If the price of the houses were payable in installments bearing interest, that contract could not be discharged by the tender of cash at the time when the buildings were completed."

The opinion thus expressed we think unquestionably correct. A debtor has no right to anticipate the payment of a debt, payable

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at a future day, and bearing interest, without the consent of the creditor.

The court is of opinion that there is no error in the decree complained of; and that the same be affirmed, with costs to the appellant.

*Decree affirmed.*

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**OULD & CARRINGTON V. CITY OF RICHMOND, appellant.**

(28 Gratt. 464.)

*Taxation of lawyers — powers of municipal corporation.*

By the charter of a city, the city council was empowered to raise sums of money, to defray the city expenses, by taxes in such manner as should be deemed expedient. By an ordinance of the council, lawyers were to be divided into classes, and the members of each class were to pay a specified tax. A committee was to make the classification, and public notice was to be given so that any lawyer dissatisfied with his classification might appear and correct it if erroneous. *Held*, that the ordinance was valid. A lawyer's license is taxable.

ACTION by Ould & Carrington against the city of Richmond to recover back taxes paid by plaintiffs to defendant under protest. The taxes were levied under a city ordinance providing that the committee on finance shall place lawyers and others in classes, and that the members of each class should be taxed a certain sum. The committee were directed to give notice of the classification by publication in two of the papers of the city, so that all persons feeling themselves improperly classified could appear and correct the error, if any. The remaining facts appear in the opinion. The plaintiffs obtained judgment, whereupon the city obtained a *supersedeas* from this court.

*Meredith*, for appellant.

*Wm. Green* and *R. T. Daniel*, for appellees.

ANDERSON, J. The power to tax rests upon necessity, and is inherent in every sovereignty. It is included in the general grant

of legislative power, and reaches, as is said by Mr. Justice COOLEY, "to every trade or occupation; to every object of industry, use or enjoyment; to every species of possession." "If the right to impose the tax exists, it is a right which in its nature acknowledges no limits. It may be carried to any extent, within the State or corporation which imposes it, which the will of such State or corporation may prescribe." Cooley on Const. Lim., chap. 14, p. 479-482. And in the language of Chief Justice MARSHALL, the power of taxing the people and their property is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable, to the utmost extent to which the government may choose to carry it. The only security against its abuse is the structure of the government itself. The influence of the constituents over their representative is the safeguard against its abuse. *McCulloch v. Maryland*, 4 Wheat. 316-428. It must always be conceded that the proper authority to determine what should, and what should not properly bear the public burden, is the legislative department of the State. This is true not only of the State at large, but it is true also in respect to each municipality or political division of the State. But these municipal corporations have only such powers as the legislature of the State confers on them. Cooley, 488. And their powers are controlled by the constitution of the United States, and of the State. The restrictions which they impose on the legislative power of the State rest equally upon all the instruments of government created by it. Id. 198.

The powers of public corporations are either express, implied, or incidental. And except as to such powers as are incidental, the charter itself, or the general law under which they exist, is the measure of the authority to be exercised. They have no inherent jurisdiction, like the State, to make laws, or adopt regulations of government. They are governments of enumerated powers, acting by a delegated authority; so that while the State legislature may exercise such powers of government, within the description of legislative power, as are not expressly or impliedly prohibited, the local authorities can exercise those only which are expressly or impliedly conferred, and such as are incidental, subject to such regulations and restrictions as are annexed to the grant. Cooley, 192.

With these general principles in view, we will now inquire, whether the charter of the city of Richmond invests the municipi-



ality with power to impose the tax complained of. And then if such power is conferred, has it been properly exercised in this case? By section 69 of the charter, sess. acts of 1869-70, p. 138, it is provided, that "for the execution of its powers and duties the city council may raise annually, by tax and assessments in said city, such sums of money as they shall deem necessary to defray the expenses of the same, and in such manner as they shall deem expedient, in accordance with the laws of this State and of the United States." This clause confers the general power of taxation, except only as it may be limited by the laws of the State and the United States; and includes all powers and subjects of taxation. And as to the manner of laying the tax, the council is invested with full discretion. And they are authorized to lay a tax to defray the expenses of the city to an amount which they may deem necessary. It seems to me that this language is broad enough to embrace, not only a tax on real and personal property, but every other description of tax which the council might deem necessary and proper, unless its meaning is limited and circumscribed by what follows.

The clauses of *this* section which follow are evidently designed to restrict the unlimited power of taxation given by the clause which has just been recited, to a certain extent, by prohibiting certain taxation which would have been included in the power given, if not thus restricted, to wit, on city bonds, or capital invested in real estate, or in manufactures outside the limits of the city, although the persons engaged in such business or manufactures have a place of business in the city, upon the stock of a corporation and the dividends thereof at the same time, upon any capital, etc., employed in a business upon which a license or other tax is imposed.

These are the only limitations as to the subjects of taxation; and consequently the power of taxation, on all other persons and subjects of taxation, is given. The other restrictions are as to the mode or manner of taxation; and they are, that the tax on property shall be equal and uniform; that capital invested in business operations shall be taxed as other property; and that stocks shall be assessed according to their market value. The power to tax lawyers' licenses is unquestionably included in the general power given by the first clause of this section; and there is nothing in the clauses limiting and restricting the general power which exempts

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them. Is there any thing in the next section which is restrictive of this power ?

This section does not employ the language of restriction. It purports to give power, not to abstract or to withhold it. It gives to the city council power to grant or refuse a license in certain cases, and to tax the license when given. After enumerating several, it adds in general terms, to "all other business which cannot be reached by the *ad valorem* system under the preceding section," the council may grant or refuse a license, and tax the same when granted. Lawyers are not named among those to whom licenses may be granted or refused, and taxed, and I think were not intended to be included. They could not be included in a provision to authorize a tax upon an occupation or business to which the council might grant or refuse a license ; for a lawyer has obtained his license from the State ; and it is not within the province of a municipal council to grant it, or to take it away. Yet, whilst a lawyer's license authorizes him to practice law in any court of the commonwealth, and it is not in the power of any municipality to deprive him of that right or to take away his license, it is a civil right and privilege, to which are attached valuable immunities and pecuniary advantages, and is a fair subject of taxation by the State, or by a municipal corporation where he resides and enjoys the privilege. It is a vested civil right ; yet it is as properly a legitimate subject of taxation as property to which a man has a vested right. I cannot perceive that there would not be as much reason for saying that a man's property is not taxable, because he has a vested right to it, as for saying that a lawyer's license is not taxable, because he has a vested right to it.

I am of opinion, therefore, that the power to tax a lawyer's license is included in the general power of taxation given by the first clause of section 69 ; and that it is not taken away by any thing that follows. But, if I were mistaken in this view, and the power is not given by the 69th section, it is given by section 1.

By that section it is enacted that the city of Richmond, for all purposes for which towns and cities are incorporated in this commonwealth, shall continue to be one body politic, "and as such shall have, exercise and enjoy all the rights, immunities, *powers* and privileges, and be subject to all the duties *now* incumbent and appertaining to said city as a municipal corporation." Acts of 1865-1866, p. 241. By section 68 of the act passed February 7th

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1866, then in force, it is enacted that, "For the execution of its powers and duties, the council may tax real estate in the city, all personal property therein," etc.; and by section 69, "The council may tax the keepers of ordinaries, brokers, lawyers, physicians, and dentists," etc. It appears, then, that the corporation was expressly invested with power to tax lawyers when, and before the new charter of 1870 was granted; and it is expressly enacted in the first section thereof, that the corporation shall have, exercise and enjoy all the powers then appertaining to the city as a municipal corporation. The power of taxation was one of its most important powers, and could be exercised only through the council. This general grant of power seems designed to supply any omissions which might be made in the provisions of the act which was to follow. So that the corporation would be invested, not only with the powers expressly granted therein, but also with all other powers with which it was then invested by previous acts of the legislature. I am of opinion, therefore, upon both grounds, that the power to tax lawyers is clearly given by the charter. It only remains to inquire, has it been constitutionally exercised in this case?

By an ordinance of the council, the lawyers of Richmond were divided into six classes; and the individuals of each class were assessed with a certain amount of taxes; and a committee was appointed, charged with the duty of assigning them to the class to which they respectively belonged. It is contended that the council could not delegate this power to a committee.

That the power of taxation is an important and delicate trust confided to the council, and cannot be delegated by them to a committee of their own body, or to any other agency, is unquestionably true. It is a legislative power; and when granted to a municipality, it can only be executed by itself, or by such agencies or officers as the statute has pointed out. So far as its functions are legislative, it rests in the discretion and judgment of the municipal body intrusted with it; and that body cannot refer the exercise of the power to the discretion and judgment of its subordinates, or of any other authority. Cooley, 204, 205, and cases cited.

But, was the assignment of the lawyers to their respective classes a legislative function? The enactment that the lawyers should be divided into six classes, and that a tax of so much should be levied upon each individual of a class, was legislative, and was performed by the council itself. Was the inquiry as to which class the law-

yers should be respectively assigned, and the assignment of them to their respective classes, a legislative or ministerial act? If it is a legislative function, the commissioners of the revenue, under a delegated authority from the general assembly, have been performing yearly, without question, legislative functions. It is a service which could not be well performed by the legislative body. It is the function of a commissioner, in order to the execution of a legislative act, and is ministerial; and it seems to me that it was competent for the council to require the service to be performed by a committee of their own body, as well as by a commissioner, or the general assessor. And it was not more necessary that the action of said committee should be reported to the council, and have its confirmation, than that similar duties by a commissioner of revenue should be reported to and confirmed by the legislature of the State. But the tax payer should be provided with ample remedies for redress, if he has been aggrieved by the action of the committee. Whether the remedy provided in this case by the ordinance of the council is adequate or not, there is not complaint by the appellees that any injustice has been shown to them; and it is a question, it seems to me, for the council and their constituents, and does not come within the province of the courts.

It is objected, also, that the mode of ascertaining the class to which the lawyers should be respectively assigned was uncertain and wholly inadequate to the attainment of justice, and vitiates the whole proceeding. If it be an income tax, as is contended it was designed to be, an assessment was necessary to ascertain what was the income of the lawyer to be taxed. And if it was not an income tax, but a license tax, that is, a tax on the civil right or privilege conferred by the license, the tax ought to be proportioned, as nearly as practicable, to the value of that right and privilege. But exact justice and equality are not attainable, and consequently not required. *Cooley on Const. Lim.* 495; *Slaughter's case*, 13 Gratt. 767; *Eyre v. Jacob*, 14 id. 422, 434, 435; *Gilkeson v. Frederick Justices*, 13 id. 577.

I do not think it was intended to be a tax on income. The classification of the lawyers shows this. It was intended to be a tax on the civil right and privilege. And it is true that the tax ought to be proportioned, as nearly as practicable, as I have said, to the value of the privilege. Justice and equality, which are of the essence of constitutional taxation, require it. The act of council

requiring the assignment of the lawyers into six classes, and the gradation of the tax upon them, according to the class to which they were respectively assigned, shows an intended approximation to equality; and if the assignment is fair and judicious, as nearly attains it as is perhaps practicable in a license tax. It is true that the principle upon which this classification is made by the 5th section of the ordinance, which is in relation to the classification of "lawyers, doctors," etc., is not in terms expressed. The 3d section in relation to "commission merchants, brokers," etc.; the 4th section in relation to "sellers by wholesale or retail of wine or spirituous liquors;" the 7th section in relation to "agents or sub-agents of any insurance company or office, whose principal office shall be located out of the city;" and the 8th section in relation to "express companies and telegraph companies, having a place of business in the city," all adopt the method of classification, as in the 5th section; nor in either is the principle expressly stated upon which the classification shall be made. If the tax upon lawyers is unconstitutional and void upon this ground, it is in all the other cases, which would be disastrous to the financial condition of the city; and a question involving consequences of such moment ought to be well considered by this court, before it declares those ordinances unconstitutional and void on this ground.

The 11th section provides, "that the committee of finance shall place each person and firm, employed in the trade or business referred to in sections 3, 4, 5, 7, and 8, in the class to which the committee shall be of opinion such person or firm properly belongs, looking to all the circumstances of the case." Now, while it is not expressed that the classification shall be made with reference to the value of the civil right or privilege conferred by the license, that, it seems to me, is the obvious design and object of the classification, and would be so understood. For what other object could a classification have been made, than to attain justice and equality as nearly as practicable by levying a tax proportionate to the value of the privilege to the party taxed; and it is to this end that the committee is instructed "to look to all the circumstances of each case." It might have been better to have expressed the object and design of the classification as a guide to the committee, but it seems to me it is manifest without being so expressed. And the charter expressly invests the council with full discretion to raise the necessary revenue, by taxes and assessments, "in such manner

as they shall deem expedient, in accordance with the laws of this State and the United States." I am not aware that these provisions of the ordinance are in conflict with any law of the State or the United States. That the discretion reposed in the committee may be abused is possible ; but not more likely, I think, than that the same power might be abused by a commissioner of the revenue. The council having, by their act of legislation, required the lawyers to be placed in six different classes, and declared what tax should be paid by the individuals composing each class, directed one of its most important standing committees, the committee of finance, to assign them respectively to such class as they should properly belong. It is fair to presume that this committee is composed of intelligent, discreet, and trustworthy gentlemen, residing in different parts of the city, who would be informed as to the relative standing of the lawyers in the city, and the extent of their business, from their own observation, and from reputation, and would not be likely to err greatly in their determination as to which class they should be respectively assigned. I should suppose that there is not an intelligent business man in the city of Richmond, such a one as should be selected as a councilman, and placed on the committee of finance, who, if not sufficiently informed as to the relative practice of every lawyer in the city, could not get sufficient reliable information by inquiry, to enable him to determine, with reasonable accuracy, to which of the six classes he should be assigned, especially after a free interchange of views with the other members of the committee.

It is true that they might be mistaken in individual instances, which I should think, however, would rarely be the case. But, as such mistakes might occur, a remedy was provided for correcting them, which was applied in this case. Now, whether this was the best mode for the attainment of justice in the classification of the lawyers it is not for me or the court to say. But I cannot perceive that it is obnoxious to the objections urged against it in argument, or especially, that it furnishes ground for avoiding the tax by a judgment of the court. That the confidence reposed in the committee might be abused is possible. But it is impossible to administer government without reposing confidence in public agents. A reasonable confidence in human agents is essential to society and to the conduct of human affairs ; and a law cannot be said to be uncon-

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stitutional because it reposes a confidence in public agents which may be abused.

As before said, there is no complaint that the tax imposed upon the appellees in this case is unequal and unjust. I apprehend the case was made in order to have an important principle as to the right of taxation settled, for the benefit of all concerned, as well as the immediate parties to this proceeding. It was believed that in this assessment there was an encroachment upon the constitutional rights of citizens; and this proceeding was properly instituted to test the question. From the best consideration I have been able to give the subject, my mind has been brought to a different conclusion. I do not think that the city council have exceeded their powers in the imposition of this tax. I am, therefore, of opinion to reverse the judgment of the court below.

MONCURE, P., and CHRISTIAN, J., concurred in the opinion of ANDERSON, J.

STAPLES and BOULDIN, JJ., dissented.

*Judgment reversed.*

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ROLLO, appellant, v. ANDES INSURANCE COMPANY.

(28 Gratt. 509.)

*Foreign attachment — securities of foreign insurance company in hands of State treasurer. Garnishment of State officers.*

An Ohio insurance company, desiring to do business in Virginia, deposited, as required by statute, securities with the State treasurer, to be returned by him when the company should cease to do business in that State, and should have satisfied its liabilities there. The company subsequently withdrew its business from Virginia and settled its liabilities there. *Held*, that it was entitled to receive back its securities, and that the securities in the hands of the treasurer were not liable to attachment at the suit of an Illinois creditor.

*It seems* that the officers of a State cannot be made liable by the process of garnishment, for funds in their hands, clothed with a trust under the authority of law.

ACTION by William E. Rollo, assignee in bankruptcy of the Merchants' Insurance Company of Chicago, Illinois, against the

Andes Insurance Company of Cincinnati, Ohio, to recover damages claimed to be \$20,000. At the time the action was commenced Joseph Mayo, treasurer of the State of Virginia, was summoned as a garnishee. It appeared that the Andes Insurance Company, desiring to engage in business in Virginia, deposited, pursuant to statute, with the treasurer of the State \$50,000 in United States bonds. The company afterward settled up its business in Virginia and satisfied the claims of Virginia residents, except a small claim of \$900, which was not considered valid, and which the company was resisting. The attachment was abated and the plaintiff obtained a writ of error.

*Johnston, Williams & Boulware*, for appellant.

*Jno. W. Daniel and Page & Maury*, for appellees.

STAPLES, J. By an act of the legislature passed February 3, 1866, amended by the act of March 3, 1871, no insurance company which has not been incorporated under the laws of Virginia can carry on business within the State until it shall have deposited with the treasurer of the State securities—State, corporate, or individual—of the cash value of at least \$10,000.

If the securities so deposited are registered or individual bonds, the company is required, at the same time, to deliver to the treasurer a power of attorney, empowering the latter to transfer the bonds, when necessary, for the purpose of meeting any of the liabilities provided for in the act. It is also provided, that any foreign insurance company doing business in the State may be sued in the courts of the commonwealth upon policies of insurance made to citizens or residents therein, in like manner as if such foreign insurance company had been incorporated by the general assembly.

And by another provision of the act it is declared that if such company shall cease to carry on business in this State, and its liabilities, fixed or contingent, to citizens of the State shall have been satisfied or terminated, upon satisfactory evidence of this fact to the treasurer, he is authorized to deliver to such company the bonds and other securities deposited with him.

There are other provisions in the act, but it is not necessary to mention them, as they have no bearing upon the matters in controversy here.



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The Andes Insurance Company, incorporated in the State of Ohio, under authority of this statute, deposited with the treasurer of this State \$50,000 of United States registered bonds, and until the occurrences hereinafter mentioned, has been carrying on the business of insurance in Virginia.

On the 29th of October, 1872, the plaintiff in error, who is the assignee in bankruptcy of the Merchants' Insurance Company of Chicago, sued out of the clerk's office of the Circuit Court of the city of Richmond, an attachment against the Andes Insurance Company upon a claim of about \$7,000.

This attachment was served the 30th of October, 1872, upon Joseph Mayo, State treasurer, by delivering to him a copy and summoning him to appear as garnishee at the next term of the Circuit Court.

When the attachment came on to be heard, a motion to abate it was made on several grounds. This motion was sustained by the court; and the attachment was thereupon quashed. The case is before us upon a writ of error and *supersedes* to that judgment. It is not deemed necessary to consider all of the grounds suggested for abating the attachment, as, in our view, one of them is decisive of the case.

It is important, in the first place, properly to understand the nature and effect of the process of garnishment. Garnishment is substantially a suit by the defendant in the attachment, in the name of the plaintiff against the garnishee. In this suit, as against the garnishee the plaintiff stands upon no higher ground than the defendant, and can acquire no greater right than the defendant himself possesses. In a case before the Circuit Court of the United States, DANIEL, J., said: "The proceeding must be regarded as a civil suit, and not as a process of execution to enforce a judgment already rendered. In this proceeding the parties have a day in court; an issue of fact may be tried by a jury; evidence adduced, judgment rendered, costs adjudged, and execution issued on the judgment." *Tunstall v. Worthington*, Hempt. 666; Drake on Attach., § 452.

Garnishment also operates as an attachment or levy upon the effects of the defendant in the hands of a garnishee. It renders the garnishee liable for such effects, or their value, if they are not forthcoming to meet the judgment of the court. And it has been held in several cases, that the garnishee will be personally responsible if

the goods are taken from him by a wrong-doer ; and this, upon the ground that the garnishee may have his action of trespass against the latter. *Parker v. Kinsman*, 8 Mass. 486 ; *Dispatch Line of Packets v. Bellamy Man. Co.*, 12 N. H. 205.

Now, it would seem to be very clear upon general principles, that the treasurer of the State having the control and custody of insurance funds and securities under an act of the legislature, cannot be subject to any proceeding of this sort. If the garnishment operates in this case, as in all others, to bind the effects, it is obvious that these securities may at any time be taken from the possession of the treasurer, to answer the demands of creditors. Judgment may be rendered against him for their value, if they are not forthcoming in obedience to the orders of the court ; costs adjudged, and executions and attachments issued to enforce obedience or secure payment. These results must follow, or the courts must contrive, in some way, to divest the judgment in those cases of the operation and effect attaching to all other judgments in proceeding by garnishment.

The treasurer may conceive it to be his duty to refuse obedience to an order of the court requiring him to surrender the securities. How is the order to be enforced. Is he to be attached while in the discharge of his official duties, taken from his office, and detained in custody, for refusing to violate a trust reposed in him by the legislature ? He may decline to appear : Is the court to hear proof of the amount or value of these securities, and order their delivery to one of the officers of the court ?

This would be to violate the whole purpose and intent of these statutes, and render them a delusion and a snare, instead of affording a security to citizens and residents of Virginia. By the express terms of the act, the treasurer is prohibited from surrendering these securities until the liabilities of the company to the citizens of the State shall have been satisfied, or shall have terminated. It is easy to perceive that the whole legislative scheme may be defeated, and the law violated, if these securities may be subjected to the claims of every foreign creditor who may assert a demand in our courts.

It is said, however, that none of these consequences can follow in this case, because the Andes Company have satisfied all their liabilities in the State, and the treasurer is willing to surrender these securities under the order of the court.

I think it a sufficient answer to this to say that we are not permitted to engraft exceptions upon the law to meet particular cases. The question must be decided on general principles, and not with reference to the particular facts of this case, or the views and opinions of the treasurer. Something more is involved than the rights and obligations of the treasurer. It is a question that concerns the State. It is certainly not compatible with her sovereignty and dignity to be arraigned before her own tribunals, at the suit of individuals, in any other mode than is prescribed by her statutes. Nor is it consistent with her interests, nor the proper administration of public affairs, that her officers shall be arrested in their public duties, and required to answer before the courts for funds or securities committed to their custody for a specific purpose, under authority of a public law. The treasurer of the State is one of the most important officers of the commonwealth, with grave, arduous and difficult duties to perform. It is impossible to foresee the mischiefs and embarrassments that will ensue, if, in addition to these duties, he is to be involved in the conflicts of creditors, to answer innumerable rival attachments, employ counsel, answer interrogatories, and otherwise consume time and attention which should be devoted exclusively to the public interests. I do not deem it necessary to cite the numerous authorities bearing upon this point. They are fully considered in *Drake on Attachment*, §§ 492 to 516 inclusive.

While there is some conflict of opinion in regard to the liability of municipal corporations and their officers to the process of garnishment, no case of acknowledged authority can be found which holds that the officers of a State can be made liable, by this proceeding, for funds in their hands, clothed with a trust under the authority of a public law. The Supreme Court of Massachusetts has announced the broad doctrine, that no person deriving his authority from the law, and obliged to execute it according to the rules of law, can be charged as garnishee in respect of any money or property held by him in virtue of that authority. *Brooks v. Cook*, 8 Mass. 256; *Colby v. Coates*, 6 Cush. 558.

However broad this principle may be thus announced, there is peculiar force in its application to the present case. The treasurer is required by the statute to retain the securities in the treasury for the special objects contemplated by the act until the liabilities of the company are settled or terminated. So long as any thing re-

mains to be done, so long as these liabilities continue, he is expressly prohibited from disposing of or surrendering them. And when the treasurer is satisfied these securities or funds are no longer required to meet any liability of the company in the State, he is authorized and required to deliver them to the company. This is the extent of his authority. His power and duty are fixed by law. Now, whether this does or does not constitute a contract on the part of the State with the insurance company, it is the law for the treasurer, fixing the measure of his authority and his responsibility. He holds the securities in trust, to be administered, first for the people of Virginia, and then for the company making the deposit. This is the distinction given them by the law, controlling not only the treasurer but the courts also ; and it would seem there is no power, except that of the legislature, to change such destination.

It was insisted, however, that in this way a foreign insurance company may effectually screen its assets from the just claims of creditors. The theory of this whole legislation is, that a foreign insurance company may come into the State, deposit its funds and securities with the treasurer, and carry on business here for an indefinite period. However long this may continue, the securities deposited cannot be surrendered or subjected to the claims of creditors. If this exemption be wrong, if the State has improperly empowered a certain class of debtors to place their assets beyond the reach of creditors, the policy of this legislation is bad, and ought to be abandoned. But this is a matter which addresses itself to the consideration of the legislature, and not to the courts.

In returning the securities to the company depositing them, the State complies with her engagement, as expressed through her statutes. The foreign creditors have no just cause of complaint. As to them the securities are in the same condition they occupied before the deposit was made. It is not to be presumed that an insurance company will permit its assets to remain in the treasury after it has ceased to carry on business in the State, merely to defeat the claims of creditors. If this shall be done, the State or the treasurer would scarcely become a party to the fraud, and the company would no doubt be required to take possession of its property. Doubtless, upon the failure of any other remedy, the courts, ever alert to prevent and suppress fraud, would, in such case,

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assume jurisdiction and afford suitable relief. Nothing of the sort is pretended in this case, and no such question arises.

Upon the whole, in every view of the case, I am satisfied the judgment should be affirmed.

*Judgment affirmed.*

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PRESTON, appellant, v. HULL.

(28 Gratt. 600.)

*Bond—filling in blank—liability of obligor.*

A bond was signed by A and B, and left in B's hands to raise money on. The understanding was that the money should be obtained of C, but B was not forbidden to get it of any one else, and a blank was left for the obligee. B got the money of D, and inserted his name in the blank. *Held*, that A was not liable to D on the bond.\*

ACTION by D. D. Hull against Charles H. C. Preston and B. F. Mantz upon a bond signed and sealed by defendants. It appeared that Mantz being indebted to Preston in the sum of \$600, informed him that he thought he could raise the money of Fayette McMullin. Preston and Mantz then signed the paper sued on, in which there was a blank for the name of the obligee; and it was left with Mantz for the purpose of getting the money. The understanding was that Mantz was to get the money of M-Mullin, but he was not instructed not to get it from any one else; and the blank was left for the name of the obligee. Mantz got the money of D. D. Hull and inserted Hull's name as obligee. The defendant Preston filed a plea of *non est factum*. Plaintiff obtained a verdict and judgment; a new trial was denied, and defendant Preston brought error to this court.

*J. W. & J. P. Sheffey*, for appellant.

*Gilmore*, for appellee.

STAPLES, J. A bond is a deed whereby the obligor promises to pay a certain sum of money to another at a day appointed. 2 Black.

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\* See *Contra*, *Field v. Stagg*, *post*, and *note*.

Com. 346. An obligor and obligee are essential to the existence and constitution of such an instrument. It is not indispensable that the party to whom the promise is made should be mentioned *eo nomine*, that his name of baptism and surname shall be given, but he must be in some unmistakable manner designated in the instrument. A writing, though executed with all the solemnities of a deed, without such obligee, is a mere nullity. It imposes no liability upon the party issuing it. It confers no rights upon him who receives or holds it. It is not simply an imperfect deed; it is no deed at all. It only becomes a deed when the name of an obligee is inserted, and delivery made by the obligee or by some one legally authorized by him. If the blank is filled by an agent, then the agent as certainly makes the deed as though the entire obligation had been written, signed, sealed and delivered by him. His act binds a principal not before bound. It creates a contract having no previous existence. It is true the act in question is merely the insertion of a name. Still, its effect is to impart vitality to a piece of waste paper. It calls new rights and obligations into existence. It is followed by all the consequences resulting from the execution of the most solemn instruments.

The argument sometimes advanced, that there can be no danger or difficulty in conferring the power by parol, when nothing remains to be done but the insertion of a name to render the instrument complete, does not meet the real issue. The question is not one of trust and confidence reposed, but of power conferred. In the numerous and diversified transactions of mankind, agencies of the gravest character are often created by parol. A partner may bind his copartner to any amount, for any matter within the scope of the partnership, by a note executed in the partnership name. The authority of an agent to sell the land of his principal may be conferred without writing, and the latter may thus be bound irrevocably for his entire estate. In the execution and indorsation of negotiable paper, powers may be and are often conferred by parol upon agents, involving liabilities to the amount of millions. The law recognizes such agencies as essential to the commerce of the world. Why may not the agent, in all these cases, impose the same liabilities by deed, in the name of his principal? If he may sell the land, fix the price, and agree upon all the terms of the contract, why may he not perform the more formal act of executing the conveyance? The answer is, the

authority of the agent must be commensurate with the act he performs. The stream can never be higher than its source. If the act of the agent is the execution and delivery of a deed, his authority must be by deed. It does not matter how much of the instrument may have been written by the principal, if it is a mere nullity when it leaves his hands, and only becomes operative by act of the agent; upon every principle of sound legal reasoning the result must inevitably be the same. Whenever the agent undertakes to bind his principal by an act, his authority, in point of dignity, must be co-equal with the act. The question is not, therefore, whether it is expedient that a mere parol agent shall have the power to fill the blank with the name of an obligee; but whether it can be done and sustained without violating well-established principles of law.

A little reflection will show that these principles are not without substantial reasons to support them. At common law a sealed instrument imposed peculiar liabilities. It was not affected by any statute of limitations. It operated as an estoppel. The obligee was not permitted to aver any want of consideration to avoid it; nor could he defeat an action at law therein by showing any failure of title, or breach of contract, or mistake, or fraud in the procurement of the bond. It is true that some of these obstacles have been removed by statute, and parties may now defend themselves in the common-law courts upon grounds purely equitable; but both in Virginia and in England sealed instruments confer rights and impose obligations, which can never grow out of the execution of any mere parol contracts. It is reasonable and just, therefore, that a party setting up a deed, and seeking to enforce it, shall be prepared to show, if necessary, that it is the act of the grantor himself, or of some one empowered by an instrument of equal dignity with the deed.

When the writing which is the subject of this controversy left the hands of Preston, it was not a deed. It certainly did not constitute a contract. It was, indeed, of no more value than the paper which contained it. When it passed into the possession of Hull it had in some way become a deed and a binding contract, according to the theory of counsel. How did it so become a deed? Certainly not by the act of Preston, as he was then absent, and was not even informed of the transaction until some time afterward.

It was the act of the agent which gave efficacy to the paper and created an obligation by deed not before in existence.

At the time Preston signed the paper it was the expectation of both Mantz and Preston that the money could be obtained from Governor McMullin; but failing in that, it may be reasonably inferred it was expected to borrow it elsewhere; and authority was given to Mantz, the agent, to fill the blank in the bond with the name of the person making the loan. Governor McMullin did not advance the money, as was expected, and the arrangement was made with the plaintiff Hull, and his name inserted as obligee in the bond. The agent did not simply fill the blank with a name previously agreed on by Preston; but he called into existence a new and unknown party, and bound his principal by a contract with him. In this respect the case is much stronger than that of the simple insertion of a name already declared by the obligor. A deed must exist before it can be delivered—that is clear. If an obligation, complete and perfect, be delivered by the obligor to a third person for the use of the obligee, it is the deed of the obligor immediately. The deed only becomes inoperative by the refusal of the obligee to receive it. In such case the delivery is the act of the principal or obligor and not of the third person or agent. *Skipwith's Ex'r v. Cunningham*, 8 Leigh, 271.

Whenever, however, the principal commits to the agent an instrument that is not complete and operative at the time, with a blank for the obligee or the sum to be paid, to be filled by the agent and according to his discretion, the act of mind, the disposing power, which are always essential and efficient ingredients of the deed, are the agents; and the instrument takes effect by his act of execution and delivery, and is binding upon the principal or not according to the authority conferred on the agent.

If Preston had indorsed his name upon a piece of blank paper with scrolls attached, and the agent had afterward added the entire obligation under the previous verbal instructions of Preston, the agent in that case would have performed an act of no greater dignity than he has in this. The trust reposed may be greater in the one case than in the other, but the result is the same. In each case the principal becomes bound by an obligation created by act of the agent.

If the name of the obligee may be inserted, why may not the sum also; and if these may be supplied, why not the mere formal parts



of the deed. If we once depart from the rule, how is the time to be drawn consistently with the preservation of any rule at all. If we say that the name or sum may be inserted by the agent, will it not lead us inevitably to the doctrine that the entire deed may be executed by the agent also? We shall be carried on step by step, if we mean to be consistent, until we have destroyed all the well-settled distinctions between sealed and unsealed instruments.

It is asked what good purpose is to be *observed* by these distinctions. It is sufficient to say that they exist; having their origin in well-established principles. In the language of Chief Justice MARSHALL, they have taken such firm hold of the law they can only be removed by the power of legislation.

We must bear in mind that one change in the law often involves the necessity of others. Much mischief ensues, many embarrassments often occur in the administration of justice, from the disregard of some well-established rule of law intimately identified by a long course of decisions, with others which, in their turn, are interwoven with the entire framework of society. If deeds are to be placed in the particulars now contended for, upon the same footing with parol contracts, there are other distinctions between them that ought to be abolished. The same act of limitation should apply to a bond as to a promissory note. The defendant should be permitted to show a want of consideration in one case as in the other. And above all, sound policy, it seems to me, requires that the whole technical doctrine of estoppel by deed should be greatly modified, if not entirely abolished.

It has been suggested that the doctrine of estoppel *in pais* might apply to a transaction like this; and the obligor estopped to deny the bond. It was said by Judge GIBSON, of the Supreme Court of Pennsylvania, in relation to a writing executed in blank, and afterward filled by a parol agent, if it could be sustained at all, it would be upon the ground of estoppel *in pais*. But, so far as I am informed, he is the only judge who has suggested the idea. No reference is made to it by Baron PARKE or Chief Justice MARSHALL, or Judge CABELL, or by the Supreme Court of the United States, or that of New York, in the cases before them. This proposition, carried to its legitimate results, will show that a mere parol agent may always bind the principal by a deed. If the obligor who trusts his agent with a writing with blanks as to the names or sums is estopped to deny that it is his bond, when the blanks are after-

ward filled by the agent, so must also the obligor who trusts his agent merely with his name and a scroll attached, when the entire obligation is afterward added. In truth the doctrine of estoppel has no application to the case. The party advancing the money is put on his guard by the face of the paper. He sees that it is not a deed, and he is bound at his peril to inquire into the authority of the agent to make it a deed. He is presumed to know the law. He must know that the agent's authority must be by deed. If he is misled, it is by his own folly and the act of the agent. It cannot be justly said that he has been deceived by the party whose signature is attached to the writing.

Having thus considered the principles affecting the case, let us see how stand the authorities bearing upon the question. In England one of the earliest cases is that of *Texira v. Evans*, decided by Lord MANSFIELD, cited 1 Anstr. 228. We have no contemporaneous report of the case. All our information is derived from the statement of an English judge, made long after *Texira v. Evans* was decided. However, the case was questioned at an early day by the most eminent judges and lawyers, and has been long since entirely overruled in the English courts. I will not attempt to comment upon or even cite the various cases. A brief reference to that of *Hibblewhite v. McMorine*, 6 Mees. & Wels. 200, will be sufficient. This case was decided by the Court of Exchequer in 1840; the opinion being delivered by Baron PARKE, than whom no more eminent common-law judge ever adorned the English bench. One question arising in the case was, whether the writing was a deed or mere note. It was held to be a deed. He then said: "Assuming the instrument to be a deed, it was wholly improper if the name of the vendee was left out; and to allow it to be afterward filled up by an agent appointed by parol, and then delivered in the absence of the principal as a deed, would be a violation of the principle that an attorney to execute and deliver a deed for another must himself be appointed by deed." He further declares: "The only case cited in favor of the validity of such deed is *Texira v. Evans*, which is not sustained by the authorities, and which cannot be considered to be law." After reviewing the various cases and showing they are not in conflict with his views, he proceeds: "It is enough to say, there is none that shows that an instrument which, when executed, is incapable of having any operation, and is no deed, can afterward become a deed by being completed and delivered by a

stranger, in the absence of the party who executed it, and unauthorized by instrument under seal."

It has been suggested that this authority has been much weakened if not overthrown by the case of *Eagleton v. Gutteridge*, 11 M. & W. 465. This is an entire mistake. The only point there decided was, that a complete and operative power of attorney was not invalidated by the insertion of the attorney's christian name in the absence of the principal. The instrument was good without the addition, and was not affected by it. The opinion of Baron PARKE, in *Hibblewhite v. McMorine*, was sustained by the unanimous decision in *Enthoven v. Hoyle*, 9 Law & Eq. 434, one of the latest cases, and is now the settled law of England. 2 Stark. Ev. 431; Buller's Nisi Prius, 281.

In the United States the authorities are conflicting. The volumes containing the various cases are not to be found in this place. Many of the decisions are cited and distinguished in Mr. Robinson's Practice, 2d vol., new edition, 86, to which I beg to refer. It seems that in New York and South Carolina the courts have followed the doctrines of MANSFIELD, in *Texira v. Evans*. In Pennsylvania formerly the same rule was adopted; but in *Wallace v. Harmstael*, 3 Harris, 462-468, Chief Justice GIBSON, speaking for the court, expressed very grave doubts of the correctness of *Texira v. Evans*, and said that case could only be sustained, if at all, on the ground that the obligee had estopped himself by an act *in pais*.

In Massachusetts I am unable to say what the rule is. The case of *Smith v. Crooker & Cushing*, 5 Mass. 538, relied upon by counsel for defendant in error, does not decide, if it even raises the question involved in this controversy. There the instrument was a complete obligation when signed by the obligor; and the alteration subsequently made was wholly immaterial. Judge PARSONS, however, in delivering his opinion, went far beyond the case before him. He declared, and this is now relied on, "That the party executing a bond, knowing there are blanks in it to be filled by inserting particular names or things, must be considered as assenting that the blanks may be thus filled up after he has executed the bond." Chief Justice MARSHALL, in "*United States v. Nelson*," hereafter to be considered, plainly shows that Judge PARSONS had reference to an *operative* instrument when executed, but having blanks to be filled with names or things already agreed on by the parties, and not to an instrument with a blank such as deprived it

of all obligatory force when signed. A blank of such vital importance that the paper, while it so remained, was a mere nullity, does not seem to have been in the view of Judge PARSONS.

I have thus named the States which are supposed to follow *Texira v. Evans*; there may be others. It is impossible to say, in the absence of the reports in the various States of the Union.

On the other hand, the Supreme Court of North Carolina, when the bench was adorned by the genius and learning of a Gaston and a Ruffin, has not hesitated to follow the later English cases, overruling the decision of Lord MANSFIELD. In *Davenport v. Sleight*, 2 Dev. & Bat. Law, 381, an instrument signed and sealed by the defendant in blank, and delivered to an agent, with directions to purchase a vessel for defendant, and fill up the instrument with the amount to be agreed on, and deliver it, was held not a good bond, even though the defendant declared his approbation of what had been done. The court considered the insertion of the sum in the blank space intended to consummate the deed, as done without legal authority; and, therefore, that the instrument is void as a bond. And with this ruling, it is believed, agree the cases in Kentucky, Maryland, Texas and Tennessee.

The same principle is laid down in Parsons on Contracts, 2d vol., 723, in the following terms, and is there supported by a strong array of cases: "If there are blanks left in a deed affecting its meaning and operation in a material way, and they are filled after execution, there should be a re-execution and a new acknowledgment."

In the case of the *United States v. Nelson*, 2 Brock. 64, Chief Justice MARSHALL did not hesitate to express his entire concurrence with the later English decisions. In that case the printed form of an official bond had been signed by the securities, with blanks for the date and penalty. It was afterward signed by the principal and the blanks filled, in the absence of the securities, without their knowledge, and without any authority from them other than might be implied from their having executed the paper with intention to bind themselves as sureties, and with full knowledge of the object of the bond. The chief justice held that the instrument was not binding upon the securities. In the course of his opinion, he said, no sum being mentioned in the bond the defendants were no more bound by the instrument they had executed, *at the time of its execution*, than if the paper had been all blank. He maintained there

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are certain differences between sealed and unsealed instruments which make it difficult to apply the principles of one contract to the other; that these differences, and rules founded on them, though originating in a different state of society, have taken such fast hold of the law that they can be separated only by the power of legislation. Throughout the opinion he kept carefully in view the distinction between an instrument which is a mere nullity, and imposes no obligation whatever until it is signed and delivered, and an instrument which is complete when executed; and the alteration is merely in the words, or in filling blanks with names or things agreed on, and by consent of the parties. And he showed that the cases relied on as sustaining the validity of blank bonds afterward filled up were all of this latter character. He admitted that the Supreme Court of the United States, in *Speake v. United States*, 9 Cranch, 28, had gone very far in deciding that an obligation may be originally created by virtue of an authority merely implied from the sealing and delivery of a paper which, in its existing state, could avail nothing; and he thought it probable the time would come when that court might completely abolish, in this particular, the distinction between sealed and unsealed instruments. But no one reading the opinion carefully can fail to perceive that the learned chief justice did not incline to this view, and that he intended to adhere to the doctrines of the common law, as expounded in England. It is to be observed that the case of *Hibblewhite v. McMorine* was decided many years afterward; so that the chief justice arrived at his conclusions without the aid of the able and exhaustive opinion of Baron PARKE.

The case of *White v. Ver. & Mass. R. R. Co.*, 21 How. (U. S.) 575, has been also much relied on as authority for the defendant in error. It was there held that the bonds of a railroad company, payable in blank, might be filled up by any *bona fide* holder, and made payable to his own order; but the reason assigned by the board is, that the usage and practice of railroad companies, of capitalists and business men of the country, and the decisions of the courts, had impressed upon this class of securities the character of negotiability; being negotiable, they were, of course, governed by the laws applicable to such instruments; one of which is, they may be executed, indorsed or uttered under a mere parol authority.

In the course of his opinion, Mr. Justice NELSON alluded to the case of *Texira v. Evans*; he admitted it was not the law in

England. He said, however, that courts of the highest authority in this country have followed Lord MANSFIELD, and have not hesitated to meet the fears expressed by Baron PARKE, that the effect would be to make bonds negotiable, by admitting the consequence. But the Supreme Court of the United States have not yet gone that far; and Mr. Justice NELSON admits that Chief Justice MARSHALL was unwilling to do so. It is conceded on all sides, that to follow the rule declared in *Texira v. Evans* is to destroy all distinction between deeds and mere parol contracts. Are we prepared for that in Virginia? No one familiar with the opinion of the judges, and the decisions of our courts, can hesitate to affirm that the disposition here is to follow the common-law decisions, and preserve unimpaired the distinction between sealed and unsealed instruments.

In *Harrison v. Tiernans*, 4 Rand. 177, the question was as to the validity of certain instruments taken by the sheriff as bail bonds. They were in the usual form, signed and sealed by the obligors, but without any sum being mentioned as the penalty of the bonds. Counsel, in arguing, endeavored to apply the principles governing bills of exchange and promissory notes, according to which a man who signs his name to a blank piece of paper will, under certain circumstances, be considered as giving authority to fill it up with a valid instrument. But this court said, Judge CABELL delivering the opinion, that bills of exchange and promissory notes *are not deeds*; and authority to execute them may be given by parol, or even inferred from circumstances; but a bail bond is a deed which cannot take effect without delivery; and that delivery can only be made by the party himself, or by some attorney legally authorized by deed for that purpose.

What are we to understand by this language: that the blanks in these bonds might have been filled by a mere parol agent? Clearly not! Judge CABELL means that this could only be done and the instrument delivered by the parties themselves, or by attorneys authorized by deed. If he does not mean this, his language does not admit of any fair and reasonable interpretation. He declares that the bonds were wholly inoperative by reason of the failure to insert a penalty. I beg to know what substantial difference there is between an instrument confessedly a mere nullity for the want of a sum to be paid, and an instrument which is a mere nullity for the want of an obligee to whom to be paid. The authority to execute

and deliver, or complete and deliver such an instrument must of necessity be the same in both cases.

In *Cleaton v. Chambliss*, 6 Rand. 86, this question arose incidentally. According to my understanding, the proposition there announced is, that any material alteration of a deed invalidates it, unless made under such circumstances of consent by the obligee as amounts to a re-execution or re-acknowledgment of the writing. The reason is obvious; the alteration changes the contract. The writing is no longer the deed of the obligor or grantor. In its altered state, it must be re-executed by him, and then it takes effect from the re-execution. Now, whether it be the re-execution of an altered deed, or the execution of a new one, or the completion of an imperfect one, there can be no well-defined distinction; and the same principle must govern in each case in respect to the act necessary to a valid instrument.

I am aware that in *Rhea v. Gibson's Ex'r*, 10 Gratt. 215, 220, Judge SAMUELS admitted there was some conflict of authority upon this point; he, however, cited a number of cases as deciding that the filling of blanks in a bond will not give it validity, unless under circumstances which make a new execution thereof. And among the cases thus cited are those I have just mentioned. Why they are authority for us I am at a loss to understand; but conceding they are not, they clearly show the bearing of the Virginia courts and judges, and they indicate a purpose to adhere to the common-law doctrines until changed by legislation.

The cases of *Clegg v. Lemessurier*, 15 Gratt. 108, and *Stinchcomb v. Marsh*, id. 202, though not involving the point in controversy here, exhibit the same tendency of our courts in this class of questions. In one of these cases, the counsel having cited the decisions of eleven States of the Union to show that the affixing of a scroll to the name is of itself sufficient evidence of its being intended as a seal, the court said, however desirable conformity with the different States might be, it furnished no sufficient reason for reversing our course of decisions. In the other case, the question turned upon the operation and effect of a power of attorney, and of acts done by a sub-agent thereunder. Counsel, in urging upon the court to give a liberal construction to the instrument, had suggested that a spirit of self-reliance and directness of purpose will prompt the people of this age and country to disregard the formalities of conveyancing and the rules of law by which they are prescribed.

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Judge LEE said this constituted no sufficient reason, nor furnished any adequate authority to change the law, or overthrow plain, intelligible and well-settled principles. That is the province of the legislature, and not of the judiciary.

I think these cases strongly illustrate the reluctance of this court to reverse its course of decisions, because other States may have adopted a different rule, or because of casual instances of hardship occurring in individual cases.

In the present case it seems to be the safest course to adhere to our previous rulings and to the doctrines of the common law as expounded by the courts of that country from which we have derived our laws, our language, and our system of jurisprudence. It is true that in many cases the principles of the common law, as sanctioned and enforced by the English courts, are ill suited to the temper of our people, and the genius of our institutions; but as a general rule, that State which most rigidly adheres to the course of English decisions and precedents will in the end attain the wisest, the most stable and the most conservative administration of justice.

For these reasons I am of opinion the judgment of the Circuit Court should be reversed, the verdict set aside, and a new trial had, in accordance with the principles herein announced.

*Judgment reversed.*

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SPEER, appellant, v. THE COMMONWEALTH.

(28 Gratt. 935.)

*Constitutional law — license to sell goods by sample — “resident merchant.”*

A State statute required a license to be obtained by every person selling goods by sample who was not a “resident merchant.” *Held*, that as a man may be a resident citizen and not a resident merchant, and the reverse, there was no discrimination in favor of citizens of the State, and therefore the statute was not unconstitutional. Such statute is not a regulation of commerce between the States.

INFORMATION against Alfred Speer for selling goods without license. The opinion states the facts.

*C. E. Stuart and Murbach, for appellant.*

*The Attorney-General for Commonwealth.*



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ANDERSON, J. The information in this case charges that the plaintiff in error, who was not at the time a resident merchant or manufacturer of this State, did by sample, card, description, and other representation, offer to sell in the city of Alexandria, in the State of Virginia, wines, brandies, goods, wares and merchandise, without having obtained the license therefor required by law. There was a demurrer to the information which was overruled. Then issue was joined upon a plea of not guilty; and upon this issue the defendant was found guilty and fined \$200. None of the facts are certified, and the only question raised by the record, is upon the demurrer to the information. Do the facts which it avers constitute an offense against the commonwealth, for which an information lies?

The offense is charged to have been committed by a person who was not a resident merchant, mechanic or manufacturer. And the specific license tax on every such person was \$100. Sess. Acts of 1870-71, chap. 193, § 20, p. 278. And by section 148 of chap. 72, id. p. 113, it is enacted that whenever a license shall be specially required by law, and whenever the general assembly shall levy a license tax on any business, etc., it shall be unlawful to engage in such business, etc., without a license. The tax, it will be perceived, is levied on, and the license required to be obtained by *every person* who sells by sample, card, etc., who is not a resident merchant, mechanic or manufacturer. And the information alleges that the defendant, who was not at the time a resident merchant, etc., did by sample, card, etc., offer to sell wines, etc., without having first obtained the license therefor required by law. And the last clause of section 101 of this act (Sess. Acts 1870-71, p. 99) declares that *any person* who shall sell or offer to sell, in violation of this act (it is not limited to the section), shall pay a fine of not less than \$200, nor more than \$500 for each offense. The court is therefore of opinion that the averments of the information clearly charge an offense against the statute.

But it is contended that the statute is unconstitutional and void, or that provision of section 101 thereof, which prohibits "any person or persons, not residents of the State, to sell or offer to sell," etc., "by sample," etc., "without first having obtained a license therefor," because it is repugnant to article 1, section 8, of the constitution of the United States, which gives congress the power "to regulate commerce with foreign nations, and among the several

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States, and with the Indian tribes :” and also to article IV, section 2, which declares that “the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.”

It seems to have been the intention of the legislature to have inhibited such sales by sample, etc., by any person who was not a resident merchant, mechanic or manufacturer, whether he was a resident citizen of this State or not. And the effect of this act would be the same if the words, “not residents of the State,” were stricken from this clause of section 101. But the court is of opinion that the question as to the constitutionality of this clause in the statute, is not raised by the pleadings in the record. It is nowhere averred in the information, or otherwise shown in the record, that the plaintiff in error was not a resident citizen of Virginia, and that this prosecution was instituted against him as such non-resident. It is averred that he is not a resident merchant, etc. But that is not tantamount to an averment that he was not a resident citizen. For he might have been a resident citizen, though not a resident merchant, etc. And whether he was or was not a resident citizen of Virginia, he was prohibited from selling or offering to sell by sample, without license, unless he was a resident merchant, etc., and was alike punishable for the infraction, whether a resident citizen or not. But even if this were not so, and this provision of section 101 of the act aforesaid, was unconstitutional, it does not appear upon the record, that the plaintiff in error has cause to complain of it, or that he has been aggrieved by the decision, inasmuch as it does not appear from the record that he was not a resident of Virginia. And it is well settled that a statute must be assumed to be constitutional and valid, “until some one complains, whose rights it invades,” as held by this court in the recent cases of *Wright, Sheriff, etc., v. Smith*, and *Antoni v. Wright, Sheriff, etc.*, 22 Gratt. 833; citing *Cooley on Constitutional Limitations*, p. 163-4.

But the appellant states in his petition that he was not a resident citizen of Virginia. Taking the fact to be as stated, and that it so appeared from the information, the court is of opinion, that there was no error in the judgment of the court below overruling the demurrer, upon the ground that the act of assembly under which the plaintiff in error was prosecuted is not in conflict with the constitution of the United States. Upon a fair construction of the said act, there is no discrimination in favor of a citizen of

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this State. The word "residence," as used in connection with the words "merchant," "mechanic" or "manufacturer," was not intended to import a personal residence, but only the "place of business." And this we think is implied by the phraseology itself; but is more clearly shown by section 147 of this same chapter, under the head of "Licenses: to whom granted;" which provides that "A license may be granted to any citizen of this State; to any person entitled to the privileges and immunities of a citizen thereof (which embraces the citizens of any of the United States); to any *person* residing in the State; to any firm or company having a place of business in the State, and doing business thereat; to any corporation created by this State, or any of the United States," etc.; so that a citizen of any of the United States has the same privilege of obtaining a license under this act, that a citizen of this State has; and, as we have seen, is liable only to the same penalty that a citizen of the State is liable to, for selling or offering to sell by sample, without license. It is also evident that the act aforesaid is purely a revenue law, and not designed to regulate commerce; and is plainly not in conflict with the clause of the Federal constitution, which invests congress with power "to regulate commerce with foreign nations, and among the several States and with the Indian tribes." It cannot be perceived how a tax upon business, which does not discriminate as to the residence or citizenship of the person, who is engaged in the business and subject to the tax, can be a regulation of commerce. The court is of opinion, therefore, that the act aforesaid is not unconstitutional, and that there is no error in the judgment of the court below overruling the demurrer, and that the same be affirmed.

*Judgment affirmed.*

**CASES**  
**IN THE**  
**COURT OF APPEALS**  
**OF**  
**NEW YORK.**

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**MERCHANTS' NATIONAL BANK OF SYRACUSE V. COMSTOCK,**  
**appellant.**

(55 N. Y. 24.)

*Accommodation note — diversion — rights of bona fide holder — Effect of proving  
debt against bankrupt.*

A *bona fide* holder for value of an accommodation note may recover the amount thereof from the accommodation indorser, notwithstanding the note has been diverted by the makers from the purposes for which it was indorsed. Defendant indorsed a note for J. & G. for their accommodation, the agreement being that the note should be used only for the purpose of taking up a prior note indorsed by defendant. J. & G., who were the makers of the note, used it, contrary to the agreement, as collateral security for a loan previously made by H. to them. H. had the note discounted at plaintiff bank, the officers of which had no notice of the agreement between defendant and J. & G. *Held*, that defendant was liable to plaintiff bank on the note.

The holder of a note, the makers of which have become bankrupt, is not estopped by proving the note as an unsecured debt in bankruptcy, from recovering the amount thereof from an accommodation indorser who holds a mortgage from the makers as security.

ACTION by the Merchants' National Bank of Syracuse against George F. Comstock upon a promissory note for \$2,500, dated March

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25, 1872, made by Jaycox & Green and indorsed by the defendant. The note was indorsed by defendant for the accommodation of Jaycox & Green, and with the agreement and understanding that the note should be used only for the purpose of taking up and canceling a prior note indorsed by defendant. Jaycox & Green, however, disregarded the agreement and transferred the note to George P. Hier as collateral security for a loan of money made previously by him to them. Before the maturity of the note, Hier had it discounted at the bank of plaintiff. The officers of the bank had no actual notice of the agreement between defendant and Jaycox & Green.

Previous to the making of the note in suit, and on or about December 5, 1871, Jaycox & Green had executed to defendant a mortgage on real estate as security to him for his indorsement on bills and notes. On April 16, 1872, Jaycox & Green became voluntary bankrupts, the note in suit being among their outstanding debts. On July 15, 1872, plaintiff appeared before the register in bankruptcy and proved the note against the bankrupts' estate, showing that the note was indorsed by defendant, but not referring to any security taken by him. The referee before whom the cause was heard found in favor of plaintiff, and judgment was entered for the amount of the note. The judgment was affirmed at general term, whereupon defendant appealed to this court.

*A. H. Green*, for appellant.

*L. W. Hall*, for respondent.

ALLEN, J. The fact that the note in suit, of which the defendant was an accommodation indorser as the surety for the makers, was diverted from the purpose for which it was made and indorsed, to the prejudice of the indorser, is fully met and overcome as a defence by the fact, also proved, that the plaintiff became the holder and owner of the note before its maturity for value actually paid, and without notice of any defense to the note, or defect in the title of its immediate indorser. Although the immediate transferee of the note from the makers received it as collateral security for the payment of a precedent debt, and, therefore, not being a holder for value, held it subject to all equities as well as legal defenses of the surety indorser, his possession of and title to the note was good as

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against the maker and his indorser; the plaintiff, receiving it in the usual course of business, and for value, is within the protection accorded by the law-merchant to all *bona fide* holders for value of negotiable instruments, and, as against the plaintiff, the defense that the note was misappropriated by the principal debtor is unavailing to the indorser.

The case does not show that Hier, who transferred the note to the plaintiff, had any notice or knowledge of any restriction upon the right of the makers in the use of the note for their benefit, or that it was made for a special purpose, and it is, therefore, immaterial to inquire whether the knowledge of Hier is in law the knowledge of the plaintiff, a banking corporation, of which he was a director. The mere fact that he had taken the note for a precedent debt did not make it non-negotiable in his hands, or affect the title of the plaintiff parting with value for it. There is no complaint that, as between the makers and Hier, the latter had not the legal right to treat and use or transfer the note as his own, so that there was no defect in his title other than as against the indorser and as resulting from the diversion of it from its proper channel and use, and that was cured by a transfer to a *bona fide* purchaser for value.

The only other defense interposed rests upon the fact that the holder of the notes has proved the debt in bankruptcy against the makers for the full amount, as an insecure claim, which, it is claimed, operated to release and discharge certain securities for the payment of the debt, by means whereof the defendant, as the surety of the makers, was discharged and released from his liability as indorser. The operation and effect of the proof of the debt in the form suggested upon the securities, and the rights of the plaintiff and the other creditors respectively in the bankruptcy proceedings, were presented in a somewhat different form, and under different aspects, and were considered by Judge HALL, in the District Court of the United States for the northern district of New York, in an elaborate and very able opinion, a copy of which has been furnished us. The questions in that court and in this are so radically different that the decision in the former cannot control here; but the opinion is nevertheless valuable as collating the authorities, and enunciating, with great distinctness, the precise status of the plaintiff in respect to the securities in question, and its legal and equitable rights in respect to them, and the results logically and legally following the omission to recognize their exist-

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ence, or claim any rights under them in making proof of the debt. The securities referred to were not to the creditors directly, but were by mortgages upon real property to the defendant, conditioned for the payment of any and all bills or notes indorsed by him, and to indemnify him against indorsements for the makers of the note in suit subsequently becoming bankrupt as a firm, and as individuals. Neither the plaintiff, nor any holder of this or any of the indorsed notes secured by these mortgages, so far as appears, had at the time any knowledge of the taking of the securities, or has since affirmed the same as a security for their benefit, or made any claim to them or any benefit from them. No proceedings have been taken, or claim made, to establish and declare the mortgages to be liens or securities for the benefit of the creditors, either as a trust or otherwise.

It is shown very conclusively by Judge HALL, and by the authorities cited by him, that creditors holding notes secured by these mortgages were certainly, after the notes had become due, in equity entitled to the benefit of them, and to have them declared a trust fund for the payment directly to them of the debts intended to be secured, and to compel an application of the securities to that purpose. *Maure v. Harrison*, 1 Eq. Cas. Ab. 93; *Moses v. Murgatroyd*, 1 Johns. Ch. 119; *Pratt v. Adams*, 7 Paige, 615; *Story's Eq. Juris.*, § 638.

There can be no doubt that the learned judge was entirely right in holding as he did that this equity was a substantial right well recognized both at law and equity, and somewhat analogous in legal effect for the purposes of that investigation and the decision of the questions then before the court, too, although not in any sense the equivalent of a security directly to the creditor, and was within the equity, although not within the terms of the twentieth section of the bankrupt act of the United States, of March 2, 1867, which prescribes the rule for the proof of debts secured in whole or in part by a mortgage or pledge of real or personal property. It necessarily followed the reasoning of the learned judge, as was adjudged, that the creditor, by proving his debt for the full amount, without taking notice of the security named, had released all right and claim to them, as well at law as in equity, and could not thereafter make any claim to a lien of any kind, whether under the mortgages directly or as a trust for the benefit of the holders of the notes. *In re Bloss*, 4 Bank Reg. 37; *In re Brand*, 3 id. 85.

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*The New Bedford Inst. for Savings v. Fairhaven Bank*, 9 Allen, 175. These and many other authorities are referred to by Judge HALL in support of his judgment. But it by no means follows that the surety is discharged from his liability as indorser. The plaintiff has done no act affecting the securities to the defendant, but has merely declined to claim or take any benefit under them, and, if Judge HALL is correct, in legal effect, released the equities it might have claimed. The securities were taken by the defendant and primarily for his benefit, and the creditors were not parties to the transaction. The validity of the securities did not depend upon any ratification or affirmance by the plaintiff or other person. It was a completed and valid transaction between the defendant and his principals, and it was only in equity and upon a direct proceeding for that purpose that the creditors could be subrogated to his rights over the securities, and, in any event, they must have been applied in the first instance to his indemnity. *Eastman v. Foster*, 8 Metc. 19. It was optional with the plaintiff to seek and take the benefit of any trust or equitable lien which the law would have given it, or to waive such right and rest content with the personal responsibility of the indorser and the security of the indorsement. The plaintiff could not be coerced to avail itself of the securities. Standing aloof from the transaction the plaintiff has not, in any manner or to any extent, affected the securities held by the indorser, or his right to enforce them for his indemnity; and all the court in bankruptcy has declared is that, by omitting to assert the equitable rights which it had before proving the debt as unsecured, it shall not now, as against other creditors, be permitted to assert such equities. The plaintiff is left to its remedy against the indorser, and the latter has the benefit of his securities, and to every other legal and equitable right against the makers and their estate. The rights of the indorser have not been impaired or affected by the act of the plaintiff and the proof of the debt as unsecured. It was unsecured to the plaintiff except by the indorsement of the defendant. There was no mortgage, lien or pledge of the property of the bankrupt to the plaintiff, and the security to the defendant was not released, and could not be released by any act of the plaintiff. The defendant has the right to enforce his security, and should he pay the debt, to share, by subrogation to the plaintiff's rights, in the distribution of the assets of the bankrupt. *Thornton v. McKewan*, 1 Hem. & Miller, 525; *Ex parte*



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*Hope*, 3 Mont., D. & De Gex, 720 ; *In re Babcock*, 3 Story, 393 ; *Richardson v. City Bank*, 11 Gray, 261 ; *Meed v. Nelson*, 9 id. 55. But it suffices that the defendant was not affected by the proof of the debt as unsecured, and that, therefore, the defendant was not released from his liability.

The judgment must be affirmed.

All concur.

*Judgment affirmed.*

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MOORE, appellant, v. METROPOLITAN NATIONAL BANK.

(35 N. Y. 41.)

*Bona fide holder — assignee of non-negotiable chose in action.*

A *bona fide* purchaser of a chose in action not negotiable from one to whom the owner has assigned the apparent absolute ownership, upon the faith of such ownership, obtains a valid title as against such owner, although the assignee had not such title.

A was the owner of a certificate of indebtedness of the State of New York, which he transferred to P. with a written assignment. The transfer was induced by false representations, and the promises of B were not fulfilled. B transferred the certificate to the bank of M., which took it on the faith of the assignment. *Held*, that the bank was entitled to hold the certificate against A. *Bush v. Lathrop*, 23 N. Y. 585, overruled.

ACTION by Levi Moore against The Metropolitan National Bank implicated with Isaac Miller to recover possession of a certificate of indebtedness of the State of New York for \$10,000, issued by the new capitol commissioners under Laws of 1869, chap. 830. It appeared that the certificate was delivered by Moore to Miller with a written assignment as follows :

“\$10,000.

“For value received, I hereby transfer, assign and set over to Isaac Miller the within described amount, say ten thousand dollars.

“LEVI MOORE.”

The assignment was procured by false representations. Miller asked Moore for a loan of \$7,000, and the latter, relying on his representations as to his responsibility, assigned the certificate and

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took two of Miller's notes amounting to \$7,000, and his check for \$3,000. Miller promised to get the certificate cashed in New York, and pay the check out of the proceeds. In case the certificate was not cashed in three weeks it was to be given up and the check and notes were to be returned to Miller. The certificate was not so cashed; but was assigned by Miller to the defendant bank. The complaint was dismissed as to the bank and judgment rendered in its favor. The general term affirmed the judgment and plaintiff appealed to this court.

*Lyman Tremain*, for appellant. The old rule that choses in action are not assignable has not been changed except as to commercial paper. 2 Bl. Com. 442; Co. Litt. 214; Story on Part., § 41. Courts of equity refuse to protect the assignee of a chose in action to the exclusion of any equitable defense of the original debtor, or the rights of the owner of the legal title of the debt. 22 N. Y. 535; Story's Eq. Jur., §§ 1039-1057; Willard's Eq. Jur. 460; *Blydenburgh v. Thayer*, 3 Keyes, 295. The Code has not changed the rights of the parties. Code, §§ 111, 112; 5 Seld. 311; *Beckwith v. Union Bk.*, 29 Barb. 383; 22 N. Y. 548; 1 Barb. 115; 2 id. 258; 22 id. 110; 15 Barb. 506; 7 How. 493. The assignee of a chose in action, in the absence of fraud, stands in the same position as the assignor. *Langley v. Dixon*, 3 H. of L. Cas. 702; 18 E. L. & E. R. 82; *Bush v. Lathrop*, 22 N. Y. 535, 548; *Shafer v. Reilly*, 50 id. 67; 27 How. Pr. 475; 22 id. 420; 27 id. 157; 34 id. 90; 31 N. Y. 425; 35 id. 283; 40 id. 311, 487; 41 Barb. 84; *Covill v. Tradesman's Bk.*, 1 Paige, 131; *McNeil v. Tenth Nat. Bk.*, 46 N. Y. 337-339; *Ingraham v. Disbrough*, 47 id. 421; *Adreus v. Gillespie*, id. 487; *Willis v. Twombly*, 13 Mass. 204; *Cochell v. Taylor*, 15 Beav. 103; 21 L. J., Chan., 545. The principle of estoppel does not apply to this case. Hill & Denio's Supp. 70; *Davis v. Bradley*, 24 Vt. 55; *Reeves v. Kimbal*, 40 N. Y. 311; *Mayenborg v. Haynes*, 50 id. 675; Coke Lit. [a], 227; Viner's Ab. "Estoppel;" Com. Dig. "Estoppel;" *Pickard v. Sears*, 6 A. & E. 469; *Plumer v. Lord*, 9 Al. 455; *Andrews v. Lyons*, 11 id. 349; *Hawes v. Marchant*, 1 Curtis' C. C. 144; *Andenried v. Bakeley*, 5 Al. 382. If defendant, Miller, was agent at all, his agency ceased at the end of three weeks. Dunlop Paley's Agency, 184. The assignor, Miller, having no title or authority at the time of his assignment, the bank required no

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better title than he had. *Ballard v. Burgett*, 40 N. Y. 314; *Harvey v. Hoppock*, 15 id. 409; *Marvin v. Ingliss*, 39 How. 329. The money received by the bank equitably belonged to plaintiff, and an action for money had and received will lie. *Munsell v. Lewis*, 2 Den. 224. The bank could not hold this chose in action against plaintiff, because it was given to its assignor for a special purpose, and negotiated by him contrary to the agreement. *Marsden v. Allen*, 8 Moea. & Welsb. 494; *Seymour v. Cowing*, 1 Keyes, 532. On a trial by a jury of issues settled in an equity action, the court cannot nonsuit the plaintiff. *Birdsall et al. v. Patterson*, 51 N. Y. 43.

*Wm. G. Choate*, for respondent. The owner of a chose in action is estopped by his own act from asserting title against the *bona fide* purchaser from another, whom he has clothed with the apparent ownership. *Raymond v. Squire*, 11 Johns. 49; *Pickard v. Sears*, 6 Ad. & El. 475; *Plumb v. Catt. Co. M. Ins. Co.*, 18 N. Y. 394; *Dezell v. Odell*, 3 Hill, 225; *N. Y. & N. H. R. R. Co. v. Schuyler*, 34 N. Y. 60. The burden of proof is on plaintiff to show that defendant's possession is wrongful. *Ross v. Bedell*, 5 Duer, 467; *Catlin v. Hansen*, 1 id. 309; *Bailey v. Bidwell*, 15 M. & W. 76; *Harvey v. Towers*, 6 Exch. 662; *Hall v. Featherstone*, 3 H. & N. 287. The nonsuit was right, because the evidence was sufficient *prima facie* that the bank was a *bona fide* purchaser for value. *Lewis v. Palmer*, H. & D. 68; *Shearer v. Barrett*, id. 70; *Wood v. Chapin*, 13 N. Y. 509, 518.

GROVER, J. The judge erred in ordering a dismissal of the complaint against the bank. Such an order could not be properly made upon the trial of issues settled in an equity action before a jury. Upon that trial, a verdict upon all the issues as to all the parties should have been rendered, and the cause afterward heard by the court upon the verdict and other competent evidence produced by the parties, and the judgment should then be given by the court. *Birdsall v. Patterson*, Com. of App., 51 N. Y. 43. But a reversal of the judgment in favor of the bank upon this ground merely, will leave the real and only question litigated between the plaintiff and the bank undisposed of. This should be avoided, if it is presented by the case in a manner enabling the court to determine it. That question is, whether the bank, having

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in good faith taken the transfer of the certificate from Miller as security for his note, given to it at the time for money then loaned by the bank to him, acquired a title to the certificate, valid as against the plaintiff, as security for the money so loaned. It is clear that it acquired nothing more as against the plaintiff or Miller upon re-payment of the money loaned, and interest, the bank would be bound to retransfer the certificate to the party entitled, which the judgment given in the action between the plaintiff and Miller shows to be the plaintiff. The bank cannot make title to the certificate upon the ground that Miller had authority from the plaintiff to sell it, as his agent in New York, for the reason that the case shows that, unless he effected a sale there within three weeks from the time he received the certificate from the plaintiff, he was to return the same to him, and receive back from him the notes and his check given by him to the plaintiff therefor, and that the bank did not obtain the certificate from Miller until after the expiration of the three weeks. Had the plaintiff authorized Miller to sell the check, as his agent, this would not confer authority to pledge it as security for a loan of money from the bank. Besides, the case fails to show that Miller was to sell the certificate, as agent for the plaintiff, but it does show that he purchased the same from him, giving notes and his check therefor, coupled with an agreement that, if he failed to get it cashed in New York in three weeks, he should return it to the plaintiff, and receive back the notes and check. This did not constitute Miller the agent of the plaintiff. \* If he got the certificate cashed, it was for himself, and the money received therefor would have been his, and not that of the plaintiff. The case further shows that the plaintiff executed an absolute transfer of the certificate written thereon to Miller, and delivered the same to him. It further shows that Miller, in making the purchase, practiced such a fraud upon the plaintiff as would authorize him to rescind the contract, as to him, and that he did, upon the discovery of such a fraud, elect to rescind the same. The question is thus presented whether a *bona fide* purchaser of a chose in action, not negotiable, from one to whom the owner has transferred the apparent absolute ownership, upon the faith of such ownership obtains a valid title as against such owner, although his vendor had not such title. The counsel for the plaintiff insists that this precise question was decided against the title acquired by such purchaser, by this court, in *Bush v. Lathrop*,

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22 N. Y. 535, where it was held that equities existing between the assignor and assignee of a chose in action, not negotiable, attend the title transferred to a subsequent assignee for value, without notice, that the latter takes the exact position of his vendor. The counsel for the bank, to sustain its title, cites *McNeil v. The Tenth National Bank*, 46 N. Y. 325; S. C., 7 Am. Rep. 341. In this it was held that, where the owner of corporate stocks conferred upon another an apparent title to or power of disposition over it, he is estopped from asserting his title as against an innocent third party who has acquired title in good faith from such apparent owner. It is obvious that both these cases cannot be upheld, unless there shall be found to be a distinction between the acquisition of title to stocks in a corporation and choses in action not negotiable. *The Commercial Bank of Buffalo v. Kortwright*, 22 Wend. 348, involved the same question as the latter, which was decided the same way by the Court for the Correction Errors. Further discussion of the principle upon which the decisions in these cases were based, or citation of the authorities sustaining it, is unnecessary. That work has been well done by the able judges who delivered the opinions therein. The counsel for the plaintiff concedes that the rule is the same in regard to goods and chattels. A citation of the numerous authorities sustaining this position is, therefore, unnecessary. Yet it is beyond question that the general rule is, that a purchaser of corporate shares or of goods and chattels acquire only such title as the vendor had thereto. *Ballard v. Burgett*, 40 N. Y. 314, was decided upon this ground. One reason why an owner of corporate shares or of goods and chattels, who has conferred upon another the apparent ownership, without transferring to him a valid title, was held precluded from asserting his title, against a *bona fide* purchaser from such apparent owner, is that such purchase was made upon the face of the title which he had apparently given, and that it would be contrary to justice and good conscience to permit him to assert his real title against an innocent purchaser from one clothed by him with all the indicia of ownership and power of disposition. Another reason was, that were the rule otherwise, it would afford opportunities for the perpetration of frauds upon the purchasers from such apparent owners. Where one, known to be the owner of shares or chattels, delivers to another the scrip or possession of the chattels, together with an absolute written transfer of all his title thereto, he thereby enables him to hold him-

self out as an owner, and, as such, obtain credit upon and make sales of the property ; and if, after he had so done, the owner was permitted to come in and assert his title against those dealing upon the faith of these appearances, the dishonest might combine and practice the grossest frauds. Another reason is that it presents a proper case for the application of the legal maxim that, where one of two innocent parties must sustain a loss from the fraud of a third, such loss shall fall upon the one, if either, whose act has enabled such fraud to be committed. All these reasons, it is obvious, apply with all their force to choses in action. Why should the owner of a horse or of bank shares, who has given to another an absolute written transfer of all his right thereto for some purpose other than that of passing the title, be precluded, as against a *bona fide* purchaser from such person, from asserting his title, while under the same state of facts, he may reclaim from such purchaser a bond and mortgage or a certificate of indebtedness like the one in question ? As to the former he estopped, while as to the latter the same state of facts, it is insisted, will work no such result. The counsel for the plaintiff insists that such distinction should be made, for the reason that the purchaser of corporate shares and chattels from the apparent owner obtains a legal title which is valid and may be asserted in a court of law, while the assignee of a chose in action, not negotiable at common law, obtained an equitable title only ; and that the equity of the former owner, being prior in time to that acquired by the purchaser, is superior thereto, the rule in equity being that, where the equities are equal, the first in time shall prevail ; but upon what ground the same state of facts that will estop a party from the assertion of a legal title will not also estop him from the assertion of an equitable one the counsel fails to show, for the very good reason that no such ground exists. It is so obvious that the estoppel should, upon principle, apply to the latter equally with the former that a distinction can only be justified upon authority.

The counsel further insists that to apply the same rule to non-negotiable choses in action will, in effect, make them negotiable. Not at all. No one pretends but that the purchaser will take the former subjects to all defenses valid as to the original parties, nor that the mere possession is any more evidence of title in the possessor than is that of a horse. In both respects, the difference between these and negotiable instruments is vital and not at all

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affected by the application of the same rule as to chattels. In *Bush v. Lathrop*, *supra*, the learned judge commences his examination of the authorities by citing there mark of Lord THURLOW, in *Davies v. Austen*, 1 Vesey, 247, that "a purchaser in a chose in action must always abide by the case of the person from whom he buys." When applied to the facts of that case it was entirely correct. It was a case where the assignee of a legacy sought to enforce rights against the executor not possessed by his assignor. He then proceeds to examine the authorities pro and con., which he thought somewhat conflicting, and arrived at the conclusion that there was a decided preponderance in favor of the right of the owner to reclaim from the *bona fide* purchaser. *Sanford v. Van Rensselaer*, Hopkins' R. 569 ; S. C. in error, 7 Cowen, 316, was much relied upon by the learned judge. That was a contest between assignees, from the same assignor, of two mortgages as to their respective priority, and had nothing to do with the point under consideration. *Covell v. The Tradesman's Bank*, 1 Paige, 131, also relied on, was placed upon the ground that the plaintiff had the legal title to the sealed note in question and the power to sue upon it, and that in such a case was entitled to the money due thereon, his equity being equal to that of the other claimant. This is now changed by the Code, by which the power to sue is placed in the assignee of choses not negotiable, and therefore the reason for the judgment no longer exists. *Muir v. Schenck*, 3 Hill, 398, was a contest between the assignees claiming from the same assignor, which was an entirely different case from the assignor who has made an absolute assignment claiming in opposition thereto from a *bona fide* purchaser from his assignee. The same remark is applicable to *Pailon v. Martin*, 1 Sand. Ch. 569, and *Sweed v. Wyck*, 3 Barb. Ch. 647. I think the conclusion of the learned judge, that the owner can assert title to a chose in action from a *bona fide* purchaser from one to whom he has given the apparent ownership, is unsound in principle and not sustained by authority. No allusion whatever is made by him to the rule as to corporate shares or chattels, or to the reasons upon which it is founded ; no distinction is made between this kind of property and non-negotiable choses in this respect, and I think that none is warranted by reason or well-considered authority. *Bush v. Lathrop* was decided by a majority of the court, three of the judges dissenting. Some of the majority may have concurred upon the ground of notice to the purchaser ; but

whether so or not, I think *McNeil v. The Tenth National Bank, supra*, identical in principle with the present, much better considered, and that its principle should control. It follows that the bank, if it made the loan in good faith to Miller, upon the credit of the certificate, acquired a title thereto valid against the plaintiff to the extent of the loan. From the papers it appears that the certificate, at the time, amounted to something more than the loan to Miller by the bank. This excess belongs to the plaintiff. Cases where *Bush v. Lathrop* was referred to, in the opinions delivered in this court, with apparent approbation were cited by the counsel; but in none of them was the question in the present case involved. In that several legal propositions were stated with perfect accuracy. It was in reference to these that the case has been so referred to, without at all considering the present question. I think the recital in the assignment from Miller to the bank, that it was for value received, was not evidence in favor of the bank against the plaintiff, of the payment or loan of the money to him; that the introduction of the assignment by the plaintiff, for the purpose of showing what claim the bank made, or for any other purpose, did not make it so.

The judgment in favor of the bank must be reversed and new trial ordered, cost of the appeal to abide the final judgment for costs in the cause.

All concur, except ALLEN and FOLGER, JJ., who concur in the result, on the ground of the mistrial; but ALLEN, J., dissents from the opinion, as to rights of a *bona fide* purchaser, and FOLGER, J., does not vote thereon.

*Judgment reversed.*



## GRAY V. BARTON, appellant.

(55 N. Y. 68.)

*Gift of debt, when valid.*

A valid gift of a debt due the donor from the donee may be made by the donor by balancing the books of account and delivering a receipt in full to the donee.

Plaintiff had an account against defendant of over \$800, and with the intention of making a gift thereof received from defendant \$1 and balanced the account by the entry "Gift to balance accounts." He also gave defendant a receipt in full. *Held*, that this was a valid gift, and plaintiff could not afterward maintain an action to recover the balance not paid.

ACTION by Cyrus Gray against William Barton to recover the balance of an account alleged to be due defendant by plaintiff. The facts appear in the opinion. The judgment of the court below was in favor of plaintiff. The appeal is by defendant.

*A. C. Niven*, for appellant. The transaction between the parties amounted to an accord and satisfaction. 4 Seld. 405. An account upon a merchant's books may be the subject of a gift. 33 N. Y. 581; 36 id. 346. The delivery of the receipt to defendant was sufficient to consummate the gift and make it valid. 2 Kent, 438; *Champney v. Blanchard*, 39 N. Y. 115; *Doty v. Wilson*, 47 id. 583.

*T. F. Bush*, for respondent. The payment of a less sum than is actually due will not extinguish the whole debt, but only so much as is paid; a receipt for more is without consideration. *Fitch v. Sutton*, 5 East, 230; *Cumber v. Wane*, Smith's Lead. Cas. 549; *Bunge v. Koop*, 48 N. Y. 225, 231; *Keeler v. Salsberry*, 33 id. 653; *Garvey v. Jarvis*, 46 id. 310; *Ryan v. Ward*, 48 id. 204. A thing cannot be the subject of a gift, unless it be the subject of actual delivery; the intention of the parties to make a gift is not sufficient. *Harris v. Clark*, 3 N. Y. 93; 2 Kent's Com. 439; *Doty v. Wilson*, 49 N. Y. 580; *Brinckerhoff v. Lawrence*, 2 Sandf. Ch. 411.

GROVER, J. The judgment cannot be reversed upon the ground of a compromise between the parties. There was some evidence tending to show that the defendant doubted the correctness of the

account rendered by the plaintiff, and that, for the purpose of satisfying himself, asked to examine his books ; and some tending to show that he denied the authority of his wife, by whom the goods had been purchased from the plaintiff, to purchase them upon his credit ; but the referee having given judgment for the plaintiff. this court cannot assume that either of these facts was found by him. Besides, the evidence does not show any compromise by the parties, either of a demand which was disputed by the defendant, or for the discharge of an admitted indebtedness upon payment by defendant of a less sum. The evidence proved, and the referee has found, that the defendant being indebted to the plaintiff, he proposed to give him the debt ; that the latter said a gift would not stand in law ; that the plaintiff said if the defendant would give him a dollar that would make it lawful, and then proposed if the defendant would give him a dollar he would give him the entire debt ; whereupon the defendant did give the plaintiff a dollar, for the purpose of satisfying the whole debt, which the plaintiff accepted, and balanced his books as follows :

Wm. Burton, cr. by cash on account.....	\$1 00
Gift, to balance account.....	820 91

And that the plaintiff, for the purpose of carrying out the arrangement, gave the defendant a receipt, of which the following is a copy : "Received of William Burton one dollar, in full, to balance all book accounts, up to date, of whatever name and nature." The referee further found that it was the intention of both parties that the plaintiff, by such acts so done, should and did give to the defendant the whole of said debt for one dollar ; which sum was paid and received for the sole purpose of discharging the entire debt. From which facts the referee deduced the following legal conclusions : That there was no valid compromise or accord and satisfaction of the debt ; that it was not a valid gift in law of the debt from the plaintiff to the defendant ; that the plaintiff was entitled to recover of the defendant the amount of the debt, less the one dollar paid. The only construction of the findings of fact is, that a gift of the entire debt, by the plaintiff to the defendant, was intended to be made, and was made, if the facts were sufficient to constitute a legal gift. No compromise of a disputed demand or of an admitted debt, upon payment of less than the

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amount, was talked of, agreed upon, or at all within the contemplation of the parties. That intention clearly was that the plaintiff should give the entire debt to the defendant, and that he should accept the same as a gift from him. The dollar was given, not in payment, but merely to satisfy defendant of its validity. The debt was then due, and the counsel of the respondent cites numerous cases where it has been held that a payment of a less sum upon a debt actually due cannot satisfy or discharge the entire debt, but only so much as is paid, although agreed to be received in satisfaction of the whole. The cases to this effect are uniform, from *Fitch v. Sutton*, 5 East, 230, to *Ryan v. Ward*, 48 N. Y. 204; *Bunge v. Koop*, id. 225. The reasons upon which these cases were determined were, that it was not good as an accord and satisfaction, as it was obvious that a smaller sum could not satisfy a greater; that, when the debt was due, payment of a part by the debtor was no consideration for a promise of the creditor to discharge the residue, as the creditor received nothing to which he was not entitled, and there being no consideration for any such agreement, it was a *nude pact* and void. To discharge the debt, it was held that there must be a release under seal. Although the reason why the use of a seal would effect a discharge while the same writing not sealed would not produce such result is rarely alluded to, yet it is perfectly obvious; at common law the seal was conclusive evidence of a sufficient consideration, and, hence, when attached to a release of a debt, was conclusive of a sufficient consideration therefor. This rule of evidence has been modified by statute to some extent. 2 R. S. 406, § 77. This modification does not extend to releases. The question in this case is not whether there was an accord and satisfaction, or a valid compromise of the debt, but whether there was a valid gift of it by the plaintiff to the defendant. Hence the authorities in regard to the two former do not apply. The counsel for the respondent insists that the defendant cannot avail himself of the latter, for the reason that it was not set up in the answer; but no such objection was raised upon the trial. Had it then been taken it might have been obviated by procuring an amendment, if necessary. Omitting to make it upon trial was a waiver. The question whether there was a valid gift of the debt upon the facts proved and found is involved in the case and must be determined. A gift may be defined as a voluntary transfer of his property by one to another, without any consideration or com-

pensation therefor. To make it valid, the transfer must be executed, for the reason that, there being no consideration therefor, no action will lie to enforce it. To consummate a gift there must be such a delivery by the donor to the donee as will place the property within the dominion and control of the latter, with intent to transfer the title to him. The question is, was there such a delivery of the debt by the plaintiff to the defendant, or what was equivalent thereto, in this case? In *Champney v. Blanchard*, 39 N. Y. 111, the defendant had in her hands money of the intestate, for which she had given the intestate a receipt. The intestate, on the day of her death, gave this receipt to the defendant, saying, in substance, she gave the defendant the money therein specified. This was held a valid *donatio causa mortis*. A delivery is equally necessary in such a gift as in one *inter vivos*. True, there was, in strictness, no debt from the defendant to the intestate. The former held the money as trustee for the latter, but the case is an authority for the position that to constitute a gift a manual delivery of the thing given is not necessary, nor need it be present in all cases; that a delivery of the evidence of the right of the donor to the donee, with intent to transfer the title, is sufficient. In *Westerlo v. Dewit*, 36 N. Y. 340, it was held that the delivery of a certificate of deposit unindorsed, with intent to transfer to the donee the money therein specified, was sufficient to constitute a valid gift of such money. It would necessarily follow that the delivery by the donor of the evidence of any debt against a third person, with like intent, would transfer the debt to the donee. In such cases the thing given is the debt, not the evidence; and yet a delivery of the latter, with intent to give the former, will effect that result. It would also follow that the delivery by a creditor of a note or bond and mortgage to his debtor, with intent to give him the debt, would be sufficient to transfer and discharge such debt. Kent (2 Com. 439), speaking of the delivery essential to a gift, says: That in this as in every other case, delivery must be according to the nature of the thing. It must be an actual delivery, so far as the subject is capable of delivery. It must be *secundum subjectam materiam*, and be the true and effectual way of obtaining the command and dominion of the subject. If the thing given be not capable of actual delivery, there must be some act equivalent to it. The donor must part not only with the possession but with the dominion of the property. If the thing given be a chose in action,

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the law requires an assignment or some equivalent instrument, and the transfer must be actually executed. The debt in this case consisted of an account for goods sold. Had the plaintiff written upon a copy of the account that the same was canceled by a gift thereof to the defendant, and signed and delivered the same to the defendant with intent to make a gift thereof to him, and the latter had accepted it as a gift from him, can there be a doubt that the gift would have been effectual? It was all the delivery the subject was capable of. But in this case the plaintiff balanced his books by gift to the defendant. Had he stopped here, making no delivery of any thing to the defendant, the act would not have been of any effect; nothing would have been delivered to him; and the books continuing in the possession of the plaintiff, the gift would not have been executed. But when, to complete his purpose of giving the debt, he executed and delivered to the defendant a receipt in full for the account, to effect the intention of the parties, the law will construe the instrument, if necessary, as an assignment of the account and of the right of action thereon to the defendant. My conclusion is that the gift of the debt was valid, and constituted a defense to the action; that the proof of want of consideration for the receipt given by the plaintiff was answered and avoided by the proof that it was given to consummate a gift of the debt by him to the defendant.

The judgment must be reversed and a new trial ordered, costs to abide the event.

All concur, except RAPALLO and FOLGER, JJ., not voting.

*Judgment reversed.*

## HATHAWAY v. JOHNSON, appellant.

(35 N. Y. 68.)

*Arrest for fraud in contracting debt — liability of principal for fraud of agent.*

A principal cannot be arrested under section 179 of the New York Code of Procedure, for frauds committed without his knowledge or authority by his agent in purchasing goods for him.

The New York Code of Procedure (section 179) authorizes an arrest "when the defendant has been guilty of a fraud in contracting the debt, or incurring the obligation upon which the action is brought." In an action to recover the purchase-price of goods sold by plaintiff to defendant, it was alleged that the sale was induced by fraudulent representations. It appeared that the purchase was made by the agent of defendant, who had no knowledge of the fraud. *Held*, that an order for the arrest of defendant was properly vacated.

ACTION by Henry B. Hathaway and another, against William Johnson, to recover the purchase price of a quantity of malt sold by plaintiffs' firm to defendant. It was alleged that the sale was procured by fraudulent representations, and an order for the arrest of defendant was granted. On a motion to vacate the order of arrest, it was shown that the purchase was made by defendant's agent, and that defendant had no knowledge of the fraud. The special term thereupon made an order vacating the order of arrest. The general term reversed this order, and the defendant appealed to this court.

*George F. Danforth*, for appellant. Defendant cannot be liable to arrest for the fraud of his agent, unless he received the fruits of his fraud with knowledge, or otherwise adopted it. *Smith v. Tracey*, 36 N. Y. 83; 3 Keyes, 109; 35 How. Pr. 215; 28 Barb. 293; 35 id. 444. Plaintiff was bound to make out his case without a doubt to sustain the order. *Mulry v. Collett*, 3 Robt. 818; *Knick. L. Ins. Co. v. Ecclesina*, 6 Abb. N. S. 9. The order is appealable to this court. Code, § 11, sub. 4; *Paul v. Munger*, 47 N. Y. 473.

*J. O. Cochrane*, for respondent. Defendant is liable because he received the goods by means of the false representations of one who was his authorized agent. *Griswold v. Haven*, 25 N. Y. 595;

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*Mech. Bk. v. N. Y. & N. H. R. R.*, 13 id. 535; *Sharp v. Mayor of N. Y.*, 40 Barb. 256; *Smith v. Frank*, 2 Robt. 626; *Cosgrove v. Ogden*, 49 N. Y. 255. Defendant cannot keep the goods and avoid the representations by which they were procured. *Bennett v. Judson*, 21 N. Y. 238.

ANDREWS, J. The single question involved in this appeal is whether, in an action against a principal to enforce a contract for the purchase of property, made by his agent, and to recover the agreed price, the principal can be arrested, on proof that the vendor was induced to enter into the contract and give the credit by means of the fraudulent representations of the agent, where the fraud was not known to or authorized by the principal, and was not ratified by him, unless such ratification is to be inferred from the receipt and use by the principal of the property purchased, before he was informed of the fraud practiced by the agent.

This question depends upon the construction to be given to that part of the fourth subdivision of section 179 of the Code, which authorizes an arrest "where the defendant has been guilty of a fraud in contracting the debt, or incurring the obligation upon which the action is brought." The obvious purpose of this provision was to introduce an exception to the general rule prevailing in this State, forbidding arrest and imprisonment for debt, and to permit this remedy in an action upon contract in the single case specified; and the test of the liability to arrest in such an action is the *guilt* of the defendant in contracting the debt or incurring the obligation sued upon. There must have been a fraudulent purpose in contracting the debt or incurring the liability on the part of the defendant whose arrest is sought. He must have been guilty of a fraud, and this implies personal misconduct, moral and actual, and not merely legal or constructive fraud, merely in respect to the transaction which is the subject of the suit. This construction is strengthened by the consideration that it harmonizes the statute with the general policy and legislation of the State. The act of April 26, 1831, "to abolish imprisonment for debt, and to punish fraudulent debtors," abrogated the system under which an innocent debtor, whose only fault might be his inability to pay his debts, could be deprived of his liberty and imprisoned at the instance of the creditor. It was a system of great severity, fruitful of oppression; and its abolition was demanded by public sentiment, influenced by the growth of more just and humane views of the

respective rights of creditors and their debtors. But the legislature excluded from the benefit of the act fraudulent debtors, by subjecting them to arrest in an action to recover the debt, and to commitment, "as other prisoners, on criminal process," until they procured their discharge in the manner provided by the act (§ 11). One of the grounds on which an arrest might be made under the act of 1831 was identical with that stated in the provision of the Code under consideration, viz., that the defendant fraudulently contracted the debt or incurred the obligation respecting which the suit was brought. (§ 4, sub. 4.)

Statutes authorizing arrest and imprisonment for debt, although remedial in that they are designed to coerce, by means of the imprisonment, the payment of the creditor, are also regarded as penal, and ought not to be extended by construction so as to embrace cases not clearly within them. *Sturges v. Crowninshield*, 4 Wheat. 200; *Von Hoffman v. The City of Quincy*, 4 Wall. 553. The statute of 1831, and the provisions of the Code authorizing arrests are *in pari materia*; and if the defendant can be arrested under the Code in an action *ex contractu* for the fraud of his agent, of which he was morally guiltless, in an action on the contract, I see no reason why he cannot be arrested and imprisoned, as a "prisoner on criminal process," under the act of 1831, which is still in force.

The order of arrest in this case is sought to be justified on the ground that the fraud of the agent acting within the scope of his authority is, in law, imputed to his principal. The authority of the agent to make the contract for the purchase of the malt is not denied; and the rule is stated by Mr. Justice STORY to be (Story on Agency, § 134), that where the act of the agent will bind the principal, then his representations, declarations and admissions respecting the subject-matter will also bind him, if made at the same time and constituting a part of the *res gestæ*. That the principal is liable for the fraudulent conduct and representations of the agent, made in the course of his dealings for the principal, where the principal has received and retained the fruits of the fraud, is affirmed by the general current of authority. *Hern v. Nichols*, 1 Salk. 289; *Crofoot v. Fwcke*, 6 M. & W. 358; *Murray v. Mann*, 2 Exch. 537; *Bennett v. Judson*, 21 N. Y. 238. It is consonant with reason and justice that a principal should not be allowed to profit by the fraud of his agent; and if he adopts the contract made in his behalf, although ignorant of the fraud, he should be held liable to make



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compensation to the party injured by it. An action for the deceit in such a case was maintained in *Bennett v. Judson*; and COMSTOCK, J., was of opinion that, in point of pleading, the fraud might be charged as that of the defendant. In *Udall v. Atherton*, 7 H. & N. 170, there is a very able discussion of the question, whether an action for deceit would lie in such a case against the principal, and the learned judges were equally divided in opinion. But admitting the right of the plaintiff to have brought an action on the case for fraud and deceit against the defendant, it by no means establishes that he was *guilty* of a fraud in contracting the debt, within the provision authorizing an arrest, in an action on the contract. The plaintiff has abandoned the pursuit of his remedy, by action for the deceit, and has elected to rely on the contract, and the fraud is no part of the cause of action, but is extrinsic to it, and must be established *aliunde* to warrant an arrest, and in this form of action it is personal and not imputed fraud which entitles the plaintiff to the order. The argument that the right to arrest, if the action has been for deceit, is to be taken into view in construing the provision in question, is without force, when it is considered that, until the amendment of 1863, no arrest was authorized in an action for fraud or deceit against a resident of the State; and if the plaintiff's construction is sound, then the defendant, before that time, could have been arrested in an action on the contract, although he could not have been in an action for the fraud. In short, the two provisions are not in construction dependent upon or connected with each other. Trover may, in many cases, be maintained against a person innocent of any intentional wrong (*Sprights v. Hawley*, 39 N. Y. 441), and, where trover will lie, an order of arrest in an action for the conversion may be issued.

But if the plaintiff should waive the tort, and bring *assumpsit* to recover the money received on the sale of the property, he could not arrest the defendant. The change in the form of the action would prevent it. The true construction of the provision of the Code referred to does not, in my judgment, warrant an arrest, under the circumstances of this case.

The order should be reversed, and the order of special term affirmed.

All concur except GROVER, J., dissenting, and FOLGER, J., not voting.

*Ordered accordingly.*

**PUTNAM v. BROADWAY AND SEVENTH AVENUE RAILROAD COMPANY, appellant.**

(85 N. Y. 108.)

*Railroad company — duty to protect passengers from violence of fellow passenger.*

A street car conductor is not bound to eject a passenger who addresses insulting remarks to his fellow passengers, although he is intoxicated, provided he remains quiet and inoffensive after being admonished by the conductor; and the company is not responsible for the results of a sudden, unlooked-for and violent attack committed by him on a fellow-passenger.

P., accompanied by two ladies, was riding in a street car, when F., who was intoxicated, got upon the car and made insulting remarks and signs to the ladies. The attention of the conductor was called to this, and he told F. to be quiet. F. then made threats of violence against P., but in a voice so low that the conductor did not hear. F. then went out upon the front platform and remained quiet. When the car stopped to allow P. and the ladies to alight, F. seized the car hook, ran to the back platform, and struck P. blows on the head from which he subsequently died. *Held*, that the railroad company was not liable.

ACTION by Ellen S. Putnam, as administratrix, against the Broadway and Seventh Avenue Railroad Company to recover for the death of Avery D. Putnam, plaintiff's intestate, who was killed by William Foster, the deceased and Foster being at the time fellow-passengers on defendant's street car.

It appeared that Putnam, in company with two ladies, was riding in the car, when Foster, who was intoxicated, got on the car and rode quietly on the front platform. He afterward went inside and made insulting remarks and signs to the ladies. Putnam called the conductor to keep "this man quiet." The conductor told Foster to "sit down and be quiet," and went back to the rear platform. Foster then threatened Putnam with violence, in a tone of voice so low that the conductor did not hear. Foster went again upon the front platform and remained quiet. When the car stopped to allow Putnam and the ladies to leave, Foster seized the car hook, and, running to the back platform, assaulted Putnam as he was assisting his companions to alight, and struck him two blows, from the effects of which Putnam subsequently died.

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Plaintiff obtained judgment, which was affirmed at general term. The defendant appealed to this court.

*John M. Scribner, Jr.*, for appellant. Plaintiff's intestate was guilty of contributory negligence which relieved defendant from liability. *Siner v. Gt. W. R. R. Co.*, L. R. (4 Ex.) 117; *Wyckoff v. Queens Co. F. Co.*, 52 N. Y. 32; S. C., 11 Am. R. 650; *Ernst v. H. R. R. R.*, 39 N. Y. 68; *Havens v. Erie R.*, 41 id. 298. If Putnam's death was owing to any willful act on the part of either driver or conductor, defendant is not responsible. *Isaacs v. Third Ave. R. R.*, 47 N. Y. 122; *Whittaker v. Eighth Ave. R. R.*, 54 id.; *McManus v. Cricket*, 1 East, 106; *Wright v. Wilcox*, 19 Wend. 343; *Vanderbill v. Rich. Turn. Co.*, 2 N. Y. 479; *Clark v. Met. Bk.*, 3 Duer, 241; *Hibbard v. N. Y. & E. R. R.*, 15 N. Y. 467; *Mali v. Lord*, 39 id. 383; *Fraser v. Freeman*, 43 id. 566; *Poultton v. Lond., etc., R. R.*, 2 L. R. (Q. B.) 534; *Roe v. Birkenhead, etc., R. R.*, 21 id. (Exch.) 9; *Lamb v. Polk*, 9 C. & P. 629. The law looks at the direct or proximate cause and not the intervening or remote cause, and hence plaintiff's cause should be dismissed for remoteness. *Bac. Max. Reg.*, 1, A. D. 1636; *Marsden v. C. & C. Ins. Co.*, L. R. (1 C. P.) 232; *Babcock v. Mont. Ins. Co.*, 4 Com. 335; *Bigelow v. Reed*, 51 Me. 325; *R. R. Co. v. Reeves*, 10 Wall. 191; 3 Pars. on Cont. 178, 180; *Sharp v. Powell*, L. R. (7 C. P.) 253; *Morrison v. Davis*, 20 Penn. St. 171; *Denny v. N. Y. C. R. R.*, 13 Gray, 481; *Adams v. L. & Y. R.*, L. R. (4 C. P.) 739; *People v. Mayor of Albany*, 5 Lans. 529; *Ryan v. N. Y. C. R. R.*, 35 N. Y. 210; *Costigan v. M. & H. R. R.*, 2 Den. 609; *Mott v. H. R. R.*, 1 Robt. 585; *McGrew v. Stone*, 53 Penn. St. 436.

*Jno. E. Parsons*, for respondent. Railroad companies are held to the strictest diligence to protect the lives and safety of their passengers. *Caldwell v. Murphy*, 1 Duer, 233; *C. & A. R. R. v. Burke*, 13 Wend. 611-626; *Alden v. N. Y. C. R. R.*, 26 N. Y. 102; *Stokes v. Sallonsall*, 13 Pet. 181; *Maverick v. Eighth Ave. R. R.*, 36 N. Y. 378; *Curtiss v. Roch. & Syr. R. R.*, 20 Barb. 282; *Hegeman v. West. R.*, 3 Kern. 9; *Grote v. C. & H. R. R.*, 2 Exch. 251; *P. & R. R. R. v. Derby*, 14 How. (U.S.) 467; *Steamboat N. W. v. K.*, 16 id. 469; *Brown v. N. Y. C. R. R.*, 34 N. Y. 404; *Flint v. N. & Y. Tr. Co.*, 34 Conn. 554; S. C., 6 Blatch. 158; *Norwich Tr. Co. v. Flint*, 13 Wall. 3; *Goddard v. C. Tk. R.*, 57 Me. 202;

*Isaacs v. Third Ave. R. R.*, 47 N. Y. 122; *Sherley v. Billings*, 8 Bush (Ky.), 147; *P. F. W. & C. R. R. v. Hind*, 7 Am. L. R. (N. S.) 14.

ALLEN, J. The questions presented upon this appeal are founded upon exceptions to the refusal to nonsuit the plaintiff at the close of the trial. If the evidence, upon any view that can be taken of it, entitled the plaintiff to a verdict, the judgment must be affirmed. The case was submitted to the jury with great fairness, and with accurate instructions as to the law, if there was in truth any evidence of a neglect of duty, or want of care on the part of the servants and agents of the defendant to which the injury to and death of the plaintiff's intestate could legally be attributed.

The cases bearing upon the liability of railway companies, and other carriers of human beings as passengers for hire, for any defect in their roadways, carriages and other vehicles of transportation, any neglect or want of care by themselves, their agents or servants in the performance of the service undertaken, and for injuries caused by or resulting directly from the acts of the carrier or his servants, either to the passenger or third persons, may be laid out of view, except as they serve to indicate the stringency and extent of the liability imposed by law upon carriers, and the extreme care and diligence required of them, in all that concerns their own acts and the agencies and means employed by them. The acts, neglects and omissions complained of here, upon which the action is based, do not come within either class of cases referred to. The passenger was carried in a safe and proper manner, and there is no complaint of injury from any defect in the means of conveyance, or any act or omission of duty on the part of the servants of the company in respect to the plaintiff's intestate personally. The wrong and injury complained of is the wanton and unprovoked as well as unlooked-for attack of a fellow-passenger, resulting in the death of the individual assailed, and the defendant is sought to be charged for the resulting damages on the ground that the servants and agents of the company, in charge of the car, negligently and improperly omitted to exercise police powers with which they are invested for the protection of well-disposed and peaceable passengers.

There is no such privity between a railway company and a passenger as to make it liable for the wrongful acts of the passenger

upon any principle. *Pittsburgh, F. W. & C. R. Co. v. Hinds*, 53 Penn. St. 512. But a railroad company has the power of refusing to receive as a passenger, or to expel any one who is drunk, disorderly or riotous, or who so demeans himself as to endanger the safety or interfere with the reasonable comfort and convenience of the other passengers, and may exert all necessary power and means to eject from the cars any one so imperiling the safety, or annoying others; and this police power the conductor, or other servant of the company in charge of the car or train, is bound to exercise with all the means he can command, whenever occasion requires. If this duty is neglected without good cause, and a passenger receives injury, which might have been reasonably anticipated or naturally expected, from one who is improperly received, or permitted to continue as a passenger, the carrier is responsible. *Pittsburgh, F. W. & C. R. Co. v. Hinds*, *supra*; *Flint v. Norwich and N. Y. Transportation Co.*, 34 Conn. 554; 6 Blatch. C. C. 158. In the case first cited, a passenger was seriously injured by a large body of drunken and riotous persons, who came upon the train in defiance of the conductor in charge; and the court in banc held that, upon the evidence in that case, the only question which should have been submitted to the jury was whether the conductor did all he could to quell the riot and eject the rioters, and that if he did not the company was liable. The judge at *nisi prius* having submitted other questions, to wit, whether the conductor allowed improper persons on the train, and whether he allowed more persons on the train than was proper, a verdict for the plaintiff was set aside, and a *venire de novo* ordered. In the other case, the action was for an injury received by the plaintiff, a passenger on the defendants' steamboat, from the falling and consequent discharge of a loaded musket, by one of a great number of riotous and drunken soldiers engaged in an affray, and occupying a part of the boat assigned to passengers, the plaintiff being suffered to enter the boat and pass to this part of it without any warning from the officers of the boat, or others, of the presence of these soldiers, and the defendants making no effort to preserve the peace or remove the offenders. Upon conflicting evidence the jury found for the plaintiff. Judge SHIPMAN, in his charge to the jury, instructed them that "the defendants were bound to exercise the utmost vigilance in maintaining order, and guarding the passengers against violence, from whatever source arising, which might reasonably be

anticipated, or naturally be expected to occur in view of all the circumstances, and of the number and character of the persons on board." This, as a rule of duty and liability, is in strict analogy and consistent with the rules by which the liability of common carriers of persons for hire is determined in other cases, and seems to be well expressed and properly limited. It may be conceded that Foster, the individual who inflicted the injury resulting in the death of the plaintiff's intestate, was drunk when he came on the car; but so long as he remained quietly by the driver on the platform, neither entering the car, nor molesting or annoying the passengers in any way, there was no occasion for removing him, and the conductor would not have been justified in refusing to permit him to remain as a passenger. The fact that an individual may have drank to excess will not, in every case, justify his expulsion from a public conveyance. It is rather the degree of intoxication, and its effect upon the individual, and the fact that, by reason of the intoxication, he is dangerous or annoying to the other passengers, that gives the right or imposes the duty of expulsion.

While Foster remained on the platform of the car, neither interfering with or noticing the other passengers, there was nothing to indicate to the conductor that his presence was offensive to the passengers, or that there was danger of harm to any one from him. There was during that time no occasion, and would have been no propriety, in causing his removal from the car. He did, however, thereafter make himself peculiarly obnoxious to the other passengers, and by his conduct and demeanor grossly insult and annoy them, and gave occasion for the exercise of the power of removal, had the conductor seen fit, or been called upon to exercise it; and had he continued his annoying practices, the conductor would have been faithless to his duty had he suffered him to remain on the car. After Foster came into the car, and insulted and intimidated the females under the protection of the deceased, the latter appealed to the conductor, not to exclude Foster from the car, but to make him be quiet, and the conductor directed him to sit down and be quiet, and he did thereupon take a seat on the opposite side of the car from the females, and near the deceased, and after remaining there a short time left the car, and took his place on the front platform, the front door of the car being closed, and, during the residue of the passage to Forty-sixth street, gave no occasion of complaint, so far as appears. He was during that time

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peaceable and inoffensive. During this latter part of the ride there was no occasion for removing him from the car, unless the occasion and a necessity for such removal was furnished by his previous conduct, showing that he was a dangerous or improper person to remain. He had ceased to address or in any way to insult or annoy the females, upon being requested by the conductor to sit down and be quiet; and his ready compliance with that request, and his taking his place soon thereafter on the platform, and proceeding quietly and peaceably on his journey, was some evidence that there was no reason to apprehend a renewal of his insults in that direction, and justified the conductor in at least giving him the benefit of a further probation. This was precisely in accord with the suggestion of the deceased; neither he nor the conductor apprehending any serious harm or injury, certainly not a wanton and murderous attack upon any one with a dangerous weapon. It is true that, on taking his seat, he did not observe the strictest rules of propriety, and, by putting his feet on the seat, violated good taste and good manners; but it was not an offense of which the passengers could very seriously complain, or which essentially violated their rights, so long as there was abundant room for all, and there was no indecency in the position. This breach of good manners certainly did not tend to show that he was a dangerous man, and was condoned by his subsequent withdrawal from the seat and the body of the car entirely. It is also in evidence that, while seated near the deceased, he directed abusive language to him, and made threats indicating an intent to do him some bodily harm before he left the car. But all this was in an under tone, and, so far as appears, was unheard by the conductor, occupying his proper place on the rear platform, and neither the deceased nor any one else called the attention of the conductor to it. It was probably treated with indifference by the deceased and all who heard it, and regarded as the maudlin and senseless gabble of a drunken man, unworthy of notice, and incapable of creating any apprehension of danger or harm. But be this as it may, there is no evidence to justify an inference that the conductor did hear, or could have heard or known of the abuse or threat, so that to him they were not evidence that he was an unsafe and dangerous man, or that there was any reason to apprehend injury to the other passengers from him or his acts.

The conductor was only called upon to act upon improprieties or

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offenses witnessed by him, or made known to him in some other way, and the defendants can only be charged for neglect of some duty arising from circumstances of which the conductor was cognizant, or of which he ought, in the discharge of his duties as conductor, to have been cognizant.

There was no evidence tending to show that the conductor was in fault for not removing the person of Foster from the car. He exerted his police powers by causing him to desist from his offensive acts and approaches toward the females, and supposed that he had done all that was necessary to preserve the peace and keep good order upon the car, to secure the other passengers against further annoyance, as well as all that the deceased asked him to do. If the peace could be preserved and the quietness and comfort of the passengers could be secured, as he supposed he had done, without the expulsion of the offender, the conductor could hardly have been called upon to proceed to extremities and put the latter from the car by force. An unnecessary resort to force, in ejecting a passenger from the car, might have given the passengers, male as well as female, more pain and annoyance than would the mere presence of a drunken man, and possibly might have seriously imperiled their persons. There was no evidence of any neglect of duty on the part of the conductor in omitting to remove the person of Foster from the cars; and whatever may be the duties or powers of the driver, except as he is in subjection to the conductor, there is no evidence that he had any notice or knowledge of any impropriety of conduct or the threatening language on the part of Foster, except as he must have witnessed what passed before Foster entered the car. There is no evidence that he had knowledge of what transpired within the car; and after Foster's return to the platform, there was nothing, so far as appears, to excite alarm, or create apprehension of danger or disturbance or annoyance of any kind. There was an entire absence of evidence of any connection or complicity of the driver with Foster, or that the driver was responsible for the possession by the latter of the iron instrument with which the blows were inflicted that caused the death of Putnam. There was no proof from whence or of whom Foster obtained it, and none to show that the driver either acquiesced in or assented to the taking of it by Foster, or that he knew that Foster had it. There was no evidence of negligence or omission of duty, or want of proper care and vigilance on the part of the servants and agents of the company



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in preserving order and keeping the peace on the cars, and protecting the passengers, to be submitted to the jury ; most certainly, none connected with the attack upon and death of the intestate, or to which it can be legally or logically traced. The rule cannot be better or more concisely expressed than as stated by Judge SHIPMAN in *Flint v. Norwich & N. Y. Transportation Co.*, *supra* : "That for any neglect or omission of duty in the preservation of order and the removal of dangerous and offensive persons by the owner of a public conveyance for the transportation of passengers, or his servants or agents, the carrier is liable for any injury to other passengers which might reasonably be anticipated, or naturally be expected to occur in view of all the circumstances, and of the number and character of the persons on board." It does not follow and cannot be presumed that because a man is drunk, and is, in that condition, offensive to others, as well by his demeanor as in his appearance, that he is a dangerous man, and that his presence imperils the safety of others ; that because he is drunk he may violently assault or murder others without provocation.

If there was any thing in the condition, conduct, appearance or manner of Foster from which the jury could reasonably infer that there was reason to expect or anticipate an attack upon the deceased, or any other passenger, either while upon the car or in the act of leaving, the facts authorizing such inference should have been proved. and knowledge of them brought home to the conductor. The injury to and death of Mr. Putnam was immediately and directly caused by the murderous attack of Foster, and the carriage of the murderer by the defendant had no connection with and did not cause the act or directly contribute to it.

It is said in *McGrew v. Stone*, 53 Penn. St. 436, that the general rule is that a man is answerable for the consequences of a fault, which are natural and probable ; but if his fault happen to concur with something extraordinary and not likely to be foreseen, he will not be answerable.

BOVILL, Ch. J., in *Sharp v. Powell*, L. R., 7 C. P. 253, uses this language : " No doubt one who commits a wrongful act is responsible for the ordinary consequences which are likely to result therefrom ; but generally speaking he is not liable for damage which is not the natural or ordinary consequence of such an act, unless it be shown that he knows or has reasonable means of knowing that consequences not usually resulting from the act are, by reason of some

existing cause, likely to intervene so as to occasion damage to a third person." The law ordinarily looks only to the proximate cause of an injury, in holding the wrong-doer liable to an action; and if the damage is not the probable consequence of a wrongful act, it is not the proximate cause, so as to make the wrong-doer liable. See *Marsden v. City and County Assurance Co.*, L. R., 1 Q. B. 232, *Bigelow v. Reed*, 51 Me. 325; *Railroad Co. v. Reeves*, 10 Wall. 176. This is the rule in cases of *tort*, when the conduct of the defendant cannot be considered so morally wrong or grossly negligent as to give a right to vindictive or exemplary damages. *Baldwin v. U. S. Tel. Co.*, 45 N. Y. 744; S. C., 6 Am. R. 165; *Boyle v. Brandon*, 13 M. & W. 738.

The assault by Foster upon the deceased could not have been foreseen, and it was not the reasonable or probable consequence of the omission of the conductor to eject him from the car, and upon principle as well as upon authority the injury was too remote to charge the defendant for the damages. In *Scott v. Shepherd*, 2 W. Bl. 892; *Guille v. Swan*, 19 Johns. 381, and *Vandemburgh v. Truax*, 4 Den. 464, the injuries were held to be the natural and direct result of the conduct of the party charged, although he did not intend the particular injury which followed.

There was no evidence to carry the case to the jury, and the motion for a nonsuit should have been granted.

The judgment must be reversed, and a new trial granted.

All concur.

*Judgment reversed.*

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POPE v. COLE, appellant.

(55 N. Y. 124.)

*Partnership debt — Liability of representatives of deceased partner.*

An action will lie against the representatives of a deceased partner for the recovery of a partnership debt, after the recovery of a judgment therefor against the survivor, and the return of an execution thereon unsatisfied, notwithstanding it may be shown that the survivor had property out of which the execution might have been satisfied, which was not discovered by the sheriff.

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Pope v. Cole.

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**ACTION** by Charles C. Pope and others against Ann J. Cole, executrix of Lewis K. Cole, to recover a debt of the firm of Draper & Cole, of which defendant's testator was a partner. A judgment had been recovered by plaintiff for the same debt against Draper, the surviving partner, but the execution thereon had been returned unsatisfied. At the trial, defendant moved for a dismissal of the complaint, on the ground that the insolvency of the surviving partner was not alleged. The motion was denied. Evidence was then introduced to show that Draper had property sufficient to satisfy the judgment, which the sheriff did not discover. The court ruled that, in the absence of collusion, the sheriff's return was sufficient to sustain the action. Judgment for plaintiff was affirmed at general term. The defendant appealed to this court.

*Isaac D. Garfield*, for appellant. No action at law can be maintained against the personal representatives of a deceased partner to recover a debt. *Egbert v. Wood*, 3 Paige, 517; *Lawrence v. Trustees, etc.*, 2 Den. 577. The remedy is in equity, and does not exist unless the surviving partner is insolvent. *Bloodgood v. Bruen*, 8 N. Y. 371; *Lawrence v. Trustees, etc.*, 11 Paige, 80; *Hamersly v. Lambert*, 2 Johns. Ch. 508; *Voorhees v. Baxter*, 18 Barb. 592. This insolvency must be alleged and proven. *Lawrence v. Trustees, etc.*, 2 Den. 577. Pleadings should state facts, and not the evidence of facts. Code, § 142, sub. 2; *Woodin v. Snow*, 10 How. 48; *Hyatt v. McMahon*, 25 Barb. 457. The complaint must state every fact which plaintiff must prove, and which defendant has a right to controvert by his answer. *Allen v. Patterson*, 7 N. Y. 476; *Bailey v. Ryder*, 10 id. 363.

*Frank Hiscock*, for respondents. The return of the execution against the surviving partner, unsatisfied, proved plaintiffs' remedy at law had been exhausted, and warranted their recovery. *Voorhis v. Child's Exr.*, 17 N. Y. 354, 356; *Richter v. Poppenhausen*, 42 id. 373, 376. It was proper to prove the return of the execution *nulla bona* against Draper. *Beardsley Scythe Co. v. Foster*, 36 N. Y. 561, 563. The sheriff's return of execution, unsatisfied, was the best evidence of this. *McElwain v. Willis*, 9 Wend. 548, 559, 569; *Dunlevy v. Tallmadge*, 32 N. Y. 457. In the absence of fraud or collusion the sheriff's return is conclusive. *Evans v. Parker*, 20 Wend. 622; *Forbes v. Logan*, 4 Bosw. 475; affirmed,

25 N. Y. 430, 437, 438 ; *Waldon v. Davidson*, 15 Wend. 575, 577, *Henderson v. Cairns*, 14 Barb. 15, 25.

GROVER, J. The question arising upon the exceptions in this case is whether an action will lie against the representatives of a deceased partner for the recovery of a partnership debt, after the recovery of a judgment therefor against the survivor, and the return of an execution thereon unsatisfied, notwithstanding it may be shown that the survivor had property out of which the execution might have been satisfied, which was not discovered by the sheriff. The position of the counsel for the appellant, that this is not a suit by a judgment creditor to obtain payment of his judgment out of the property of his debtor, which cannot be seized upon execution, is correct. In this class of cases the counsel concedes that, in the absence of collusion by the plaintiff, the return upon the execution issued to the proper county is conclusive evidence, and he might have added, the only competent evidence, that the legal remedy has been exhausted; at common law, when one joint debtor died, the remedy at law could only be had against the survivor. The estate of the deceased was only liable in equity for the payment of the debt. *The Trustess of the Leake and Watts Orphan House v. Lawrence*, 11 Paige, 80; *Same Case in error*, 2 Denio, 577, and cases cited. The same rule applied to the case of a deceased partner. Cases *supra*. This was formerly the rule in England. The rule there as to a deceased partner has been somewhat changed, upon the theory that partners were severally as well as jointly liable for the payment of the partnership debts. This change has not been adopted in this State. See cases *supra*, and *Grant v. Shurter*, 1 Wend. 148. To enable a partnership creditor to maintain an action against the representatives of a deceased partner, he must show an inability to collect his debt from the survivor. *Voorhis v. Childs*, 17 N. Y. 354; *Richter v. Poppenhausen*, 42 id. 373. But when such inability is shown, the action may be maintained. The counsel for the appellant insists that the only mode of showing such inability is to aver and prove the actual insolvency of the survivor. His argument is that, inasmuch as the legal title to all the partnership assets vests in the survivor, and that these are the primary fund for the payment of the partnership debts, equity will not enforce payment of such debts from the estate of the deceased until actual insolvency of the survivor

is established. But we have already seen that payment of a joint debt, when no partnership between the debtors ever existed, can be enforced out of the estate of one of the deceased debtors under the same circumstances only as in the case of partners, that is, by showing an inability to collect the debt from the survivor. This is so, irrespective of the question whether there was at the time of the death of the joint debtor any joint property owned by the debtors which vested in the survivor. A surviving partner is equally liable at law for the payment of the entire copartnership debts, although there were no assets of the firm at the time of the decease of his partner, as though such assets were ample for that purpose. This shows that the reason assigned by the counsel for the rule is not the true one. That reason was given, by some of the judges in the cases above referred to, for not adopting the later English doctrine, holding partners severally, as well as jointly, liable for the debts of the firm, and, upon this ground, sustaining actions against the representatives of the deceased partner for the recovery of the debts of the firm, wholly irrespective of the ability of the survivor to pay them. The legal remedy upon all joint obligations, in case of the death of one or more, could, by the common law, be had only against the survivors. The estate of the deceased was, at law, discharged, but equity held such estates liable. The creditor's case, then, was this: He had a legal remedy against the survivor for the collection of his debt, and a lien in equity upon the estate of the deceased. But courts of equity, as a general rule, would not entertain an action in case there was an adequate legal remedy, by which full redress could be obtained. Hence, it followed that, to enable a creditor to collect his debt in equity from the estate of a deceased joint debtor, he must show that he could not collect it by proceedings at law against the survivor. It was held sufficient, for this purpose, to aver and prove the insolvency of the survivor. Hence, this averment will be found in the reported cases. But the want of an adequate legal remedy is equally manifest where that has been resorted to by the creditor in good faith, and exhausted, without obtaining satisfaction. It has there been demonstrated that there is no such remedy, and the creditor may then avail himself of the equitable liability of the estate of the deceased debtor. All this has been done by the plaintiffs in this case.

It is now said, by the counsel for the appellant, that the plain-

tiffs ought to be precluded from this equitable remedy, for the reason that the survivor had property from which, had the sheriff discovered it, the execution might have been satisfied. But the plaintiffs were not in fault for the failure of the sheriff to discover this property. They had done all that was required of them when they had delivered the execution to the sheriff. It was not their, but the duty of the sheriff, to ascertain whether the debtor had property to satisfy it; and when the sheriff returned that he had not, the legal remedy was exhausted, and the plaintiffs were at liberty to pursue their equitable remedy against the estate of the deceased. It follows that, where the plaintiff can prove the insolvency of the survivor, and thus show that he has no legal remedy for the collection of his debt against him, he may proceed to enforce payment from the estate of a deceased partner, or other joint debtor, without bringing an action against the survivor, or he may exhaust his legal remedy against the survivor, and then proceed against the estate of the deceased debtor. The representatives of the estate of the deceased debtor have an adequate remedy against the sheriff, in case of a wrongful return of the execution.

The judgment appealed from must be affirmed, with costs.

All concur; ANDREWS, J., not sitting.

*Judgment affirmed.*

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**COOK, assignee, appellant, v. WHIPPLE.**

(55 N. Y. 150.)

*Jurisdiction of State court — action by assignee in bankruptcy. Judgment by confession — defective verification. Security for future advances.*

In the absence of any thing limiting the jurisdiction of a State court, it has power to entertain an action by an assignee in bankruptcy, to determine rights to property claimed by him, or to recover the estate of the bankrupt; and the provisions of the bankrupt act conferring jurisdiction in such actions upon the federal courts, and declaring certain conveyances fraudulent which were not so under the State laws, do not exclude the jurisdiction of the State courts.

The verification of the statement to a judgment by confession was upon information and belief only, which was insufficient. In an action by the assignee in bankruptcy of the judgment debtor against the judgment creditor, to test

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the validity of the judgment, *held*, that the defendant was entitled to have the verification amended.

By section 883 of the New York Code of Procedure, it is provided that judgments by confession may be entered without action, either for money due or to become due. Judgments were confessed by C. to secure defendants for their notes and other commercial paper, which they were to advance to C. to be used in his business, and which were in fact so advanced and used. *Held*, that the judgments were valid.

ACTION by William F. Cook as assignee of William Cressy, a bankrupt, against Waters W. Whipple and others, to recover certain sums of money and the proceeds of certain sales of property received by defendants from Cressy; also to set aside two judgments by confession and the executions and sales thereon. The case is sufficiently set forth in the opinion. Judgment in favor of defendants entered on the report of a referee was affirmed at general term; whereupon the plaintiff appealed to this court.

*Augustus C. Hand*, for appellant. The judgments and executions and sale thereunder were invalid, and gave no title to the property sold. Code, § 383; *Chappel v. Chappel*, 12 N. Y. 215; *Dunham v. Waterman*, 17 id. 9; *McDowell v. Daniels*, 38 Barb. 133; Voorhies' Code, 1870, 594, 595, cases cited; *Winnebrenner v. Edgerton*, 30 Barb. 185; *Davis v. Morris*, 21 id. 152; *Clements v. Gerow*, 30 id. 325; *Boyden v. Johnson*, 11 How. 503; *Harmann v. Weinhart*, 11 Abb. 152. The facts constituting the liability in a statement for judgment by confession must be stated and particularly shown. Code, § 383, sub. 3; *Marks v. Reynolds*, 12 Abb. 403; *Daley v. Matthews*, id. 404, note; *Lawless v. Hackett*, 16 Johns. 149. The verification could not be amended by the referee, nor by a judgment entered upon his report. *Ingram v. Rollins*, 33 N. Y. 409; *Hammond v. Bush*, 8 Abb. 152; *McDonnell v. Daniels*, 38 Barb. 143; *Winnebrenner v. Edgerton*, 30 id. 185; *Dunham v. Waterman*, 17 N. Y. 9. No amendment, if allowable, could have a retroactive effect and preserve a judgment as a prior lien. *Van Beck v. Sherman*, 13 How. 472; *Hammond v. Bush*, 8 Abb. 152; *Boyden v. Johnson*, 11 How. 503; *Mitchell v. Van Buren*, 27 N. Y. 333; *Lawless v. Hackett*, 16 Johns. 149; *Johnson v. Fillerman*, 18 How. 21; *Buchan v. Sumner*, 2 Barb. Ch. 165. When the defendants received the amount specified in the judgment, the judgments became satisfied and extinguished. *Kirby v. Marlboro*,

2 M. & S. 18; *Truscott v. King*, 2 Seld. 147; *Mead v. York*, id. 449; 8 Wend. 417, and cases cited; 2 Story's Eq. Jur. 459 *a*, 459 *g*; *Clayton's case*, 1 Merv.; *Bodenham v. Purchas*, 2 B. & A. 45; *Pattison v. Hull*, 9 Cow. 747; *Shepherd v. Steele*, 43 N. Y. 52; *Allen v. Culver*, 3 Den. 234; *U. S. v. Kirkpatrick*, 9 Wheat. 720; *Stone v. Seymour*, 15 Wend. 19; 2 Poth. on Obl. (by Evans), chap. 1, art. 7, § 528, *et seq.*; Domat (by Cushing), 2282. The agreement of 1867 was oral, and was not admissible to change the contract or affect the judgments. *Truscott v. King*, 2 Seld. 147; *Mead v. York*, id. 449; *Bunell v. Henry*, 1 Sand. Ch. 34; *Divver v. McLaughlin*, 2 Wend. 596; *Lanning v. Carpenter*, 48 N. Y. 408; *Knuttle v. Newcomb*, 22 id. 249, 253; *Ccnnor v. Hernstein*, 6 Rob. 552. Plaintiff can make these objections. *Toof v. Martin*, 13 Wall. 146; *Bk. of Leavenworth v. Hunt*, 11 id. 391; *Bradshaw v. Klein*, 1 B. Reg. 146; S. C., 7 Am. L. R. (N. S.) 505; *In re Burns*, id. 105; Bankrupt Act, § 14; *Norris v. Denton*, 30 Barb. 117; *Kendall v. Hodgins*, 1 Bosw. 659. Neither the judgments nor the contract recited in the last judgment authorized defendants to take the lumber. *Edgel v. Hart*, 5 Seld. 213; *Mittnacht v. Kelly*, 3 Keyes, 407; S. C., 3 Tr. App. 342; *Gardner v. McEwen*, 19 N. Y. 123; *Lunn v. Thornton*, 1 C. B. 379. Defendants' proceedings were in direct violation of the bankrupt act. Bankrupt Act of March 2, 1867, §§ 14, 22, 23, 27, 29, 35, 39; *Toof v. Martin*, 13 Wall. 40; *Traders' Bk. v. Campbell*, 14 id. 37; *Everett v. Stone*, 3 Stor. 446; *Peckham v. Burrows*, id. 544; Notes by Avery & Hobbs to § 29, *n. g*, p. 214, *n. c*, 223; § 35, *n. a*, p. 251; § 39, *n. c*, and cases cited; *Lindner v. Sharp*, 7 Scott's N. R. 145; S. C., 6 M. & G. 895; *Shawham v. Wheritt*, 7 How. (U. S.) 644; *In re Black & Secor*, 1 Bank. Reg. 81; *Tuttle v. Truax*, id. 169; *Grow Ass. v. Ballard*, id. 69; *Graham v. Stark*, 3 id. 92; *In re Wells*, id. 95; *Strahan Ass. v. Gregory*, Nat. Bk. Reg. 142; *Rison v. Knapp*, id. 114; *Battie Ass. v. Gardner*, id. 106; *In re Stevens*, id. 122; *Kohlsaat v. Hognet*, 5 id. 159; *Sawyer v. Turpin*, id. 339; *Hood v. Karper*, id. 358; *Pratt v. Curtis*, 6 N. B. Reg. 139; *Davis v. Anderson*, id. 145; *In re Forsyth*, 7 id. 174; *In re Perrin v. Hane*, id. 283. The contract being void as a lien by the State law for failure to file in clerk's office, it is void under the bankrupt law. 45 N. Y. 614. The State court had jurisdiction. *Wimbon's Ass. v. Clark*, 47 N. Y. 261; *Sherman v. Bingham*, 7 B. Reg. 497; *Payson v. Dietz*, 12 Am. L. Reg. (N. S.) 511, and cases cited.



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*Esek Cowen*, for respondents. The error in the verification of one of the judgments is amendable, even as against creditors. *Mitchell v. Van Buren*, 27 N. Y. 300; *Ingram v. Robbins*, 33 id. 409, 418; *Union Bk. v. Bush*, 36 id. 631. The judgment is good without amendment as against plaintiff, who had no lien on the property or title thereto at the time of the levy. *Miller v. Earle*, 24 N. Y. 110; *Neusbaum v. Keim*, id. 325. It is voidable only as to creditors who have acquired valid judgments against the debtor or subsequent *bona fide* purchasers. *Stone v. Williams*, 40 Barb. 322; *Miller v. Earle*, 24 N. Y. 110; *Beekman v. Kirk*, 15 How. 228; *Schieffelin v. Hawkins*, 14 Abb. 112; *Reed v. Sands*, 37 Barb. 185; *Bliss v. Cottle*, 32 id. 322; *In re Howe*, 1 Paige, 125; *Field v. Ripley*, 20 How. 26; *In re Campbell*, 7 A. L. R. 100; *In re Burns*, id. 105; *In re Kerr*, 8 id. 237. Both judgments were good for the amounts for which they were confessed. *Dow v. Patner*, 16 N. Y. 562; *Truscott v. King*, 6 id. 147; *Robinson v. Williams*, 22 id. 380; *Healy v. Preston*, 14 How. 20; *Livingston v. McInlay*, 16 Johns. 165; *Wilder v. Fonday*, 4 Wend. 100; *Lansing v. Woodworth*, 1 Sandf. Ch. 43; *Brickerhoff v. Marvin*, 5 Johns. Ch. 320; *Carey v. Grant*, 59 Barb. 574. The lien of the execution upon the personal property was valid. *Beers v. Place*, 4 N. B. Reg., No. 19, p. 150. It was competent for the parties to apply the payments as they chose. *Capen v. Alden*, 5 Metc. 268. The State court had not jurisdiction. *U. S. v. Lathrop*, 17 Johns. 4; *Dudley v. Mayhew*, 3 N. Y. 9; *Brigham v. Clafin*, 31 Wis. 607; *Gilbert v. Priest*, 7 A. L. J. 340.

GROVER, J. The counsel for the respondents insists that the court had no jurisdiction of the subject-matter of the action, and that for this reason the complaint should be dismissed. Although this question was not raised upon the trial, or at the general term of Supreme Court, and consequently was not passed upon by the general term, yet, if the ground of the objection is such that it could not have been obviated in the court of original jurisdiction, had it been made there, it may be insisted upon in this court, and, if found valid, the party is entitled to the benefit thereof. *Delafield v. The State of Illinois*, 2 Hill, 159. Such is the character of the objection in this case.

To determine whether the Supreme Court had jurisdiction of the subject-matter, we must ascertain what that is. From the com-

plaint, it appears that the plaintiff prosecutes as the assignee in bankruptcy of William Cressy, and, in that character, claims a recovery from the defendants upon several causes of action set out therein, among which will be found the following: That Cressy, on the 11th October, 1867, was insolvent, to the knowledge of the defendants; and that, within six months prior to filing his petition in bankruptcy, he made payment and transfers to the defendants of money and property to the amount of \$50,000, with the view of preventing the property coming to the assignee, and in fraud of the bankrupt act. Also that Cressy, being insolvent four months before the filing of his petition, to the knowledge of the defendants, who were his creditors, with a view of giving them a preference within that time, procured the seizure of \$30,000 worth of logs upon an execution in their favor, and the sale and consignment of the logs to them; also, for the alleged conversion, by the defendant, of \$50,000 in money, and the like amount of property owned by Cressy at the time of filing his petition; also to have certain judgments, confessed by Cressy to the defendants, declared invalid, upon the grounds that they had been confessed in part to secure pretended debts due to, and liabilities which had not been incurred by, the defendants for Cressy; and on the further ground, that what was really due and incurred had been paid; and also a debt of \$50,000, due and owing by the defendants to Cressy, for money received by them for Cressy, for property sold by them as his commission merchants. The appropriate relief, based upon these causes of action, is prayed.

Section 14 of the bankrupt act (14 U. S. Statutes at Large, 522), among other things, provides that, as soon as the assignee is appointed and qualified, the judge — or, where there is no opposing interest, the register — shall, by an instrument under his hand, assign and convey to the assignee all the estate, real and personal, of the bankrupt, with all his deeds, books and papers relating thereto, and that such assignment shall relate back to the commencement of said proceedings in bankruptcy; and thereupon, by operation of law, the title to all such property shall vest in said assignee, although the same is then attached on mesne process as the property of the debtor, and shall dissolve any attachment made within four months next preceding the commencement of said proceedings. And further, that all property conveyed by the bankrupt, in fraud of his creditors, all rights in equity, choses in

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action, etc., all debts due him or any other for his use, and all liens and securities therefor, and all his rights of action for property or estate, real or personal, and for any cause of action against any person arising from contract or from the unlawful taking or detention of or injury to the property of the bankrupt, etc., shall, in virtue of the adjudication of bankruptcy and the appointment of his assignee, be at once vested in such assignee, and that he may sue for and recover the said estate, debts and effects. Section 35 of the act provides that if any person, being insolvent or in contemplation of insolvency, within four months before the filing of the petition by or against him, with a view to give a preference to any creditor or person having a claim against him, or who is under any liability for him, procures any part of his property to be attached, etc., or makes any payment or pledge, assignment, transfer or conveyance of any part of his property, directly or indirectly, absolutely or conditionally, the person receiving such payment, pledge, assignment, transfer or conveyance, or to be benefited thereby or by such attachment, having reasonable cause to believe such person is insolvent, and that such attachment, payment, pledge, assignment or conveyance is made in fraud of the provisions of the act, the same shall be void, and the assignee may recover the property or its value from the person so receiving it, or so to be benefited. The section also makes void other payments and transfers of property, if done within six months next preceding the presentation of the petition, under the circumstances specified, and provides that the assignee may recover such property, or the value thereof, as assets of the bankrupt. The effect of this is entirely clear. It makes void, as to an assignee in bankruptcy, all payments and transfers of property by the insolvent under the circumstances specified, and vests the title to such property in the assignee, the same as though no such act had been done by the insolvent.

The Supreme Court has, under the constitution and laws of the State, general jurisdiction of all cases in law and equity. It would follow that, in the absence of any thing limiting such jurisdiction, its power to try and determine all rights of property claimed by an assignee in bankruptcy, and all equity suits in regard to such property, or in any way affecting it, could not be doubted. The jurisdiction of the State court over the subject-matter, when that is the right of action upon a contract for the recovery of property.

real or personal, does not depend upon the means by which the title was acquired. An action will lie in this State upon a contract made in Canada, or any of the States of the Union, if valid by the law where made. By section 14 of the bankrupt act, all the estate, real and personal, including choses in action, by the adjudication and assignment, becomes absolutely vested in the assignee. Should ejectment be brought by the assignee for the recovery of the possession of land owned by the bankrupt, why should the Supreme Court of the State be deprived of jurisdiction upon the ground that the plaintiff's title was based upon an act of congress? Should the assignee sue upon a chose in action, the title to which was acquired by virtue of the bankrupt act and the proceedings had under it, would this deprive the Supreme Court of jurisdiction? That jurisdiction, we have seen, includes all cases in law and equity, and clearly cannot at all depend upon the source from which the rights were acquired.

But I do not understand the counsel for the respondents as challenging the jurisdiction of the court upon this ground. His position, as I understand it, is, that the Constitution of the United States having vested power of passing bankrupt acts in congress, that body may, in its discretion, confer upon the federal courts exclusive jurisdiction of all matters connected therewith, and that, by the act under consideration, they have done so. Assuming, for the argument, that congress might have so enacted, let us see whether, by the act in question, they have so done. Section 1 of the act provides that the several District Courts of the United States be and they are hereby constituted courts of bankruptcy, and that they shall have original jurisdiction in their respective districts in all matters and proceedings in bankruptcy, and they are hereby authorized to hear and adjudicate upon the same according to the provisions of this act. The jurisdiction thus given depends wholly upon the act, and is necessarily exclusive, because independent; there is no jurisdiction in any tribunal over any such proceedings, and no original jurisdiction is given to any other. This includes all proceedings for adjudging any one a bankrupt, thereby vesting title to his property in an assignee appointed pursuant to the act. This appears to have been the intention of this provision, as the act further provides that the jurisdiction thereby conferred shall extend to all cases and controversies arising between the bankrupt and any creditor or creditors who shall claim any debt or demand under the

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bankruptcy, to the collection of all the assets of the bankrupt, etc. In the absence of this latter clause it might well be doubted whether the District Court would have had jurisdiction of an action brought by the assignee for the recovery of a debt due, or property belonging to the bankrupt, when both parties were citizens of the same State. To remove such doubt was the purpose of the clause, and not at all to deprive State courts of jurisdiction of such actions, vested in them by the laws and constitutions of the States. Section 2 of the act confers upon the Circuit Courts, within and for the districts where the proceedings in bankruptcy shall be pending, a general superintendence and jurisdiction of all cases and questions arising under the act; and, upon bill, petition or other proper process, to hear and determine the case, in a court of equity, and also concurrent jurisdiction with the District Courts of the same district of all suits, at law or in equity, brought by the assignee, relating to the property of the bankrupt. This concurrent jurisdiction of suits at law and in equity, in suits brought by the assignee, relating to the property of the bankrupt, conferred upon the Circuit Courts, shows no intention to exclude these cases from the jurisdiction of the State courts. The clause declaring that the Circuit Courts shall have a general superintendence and jurisdiction of all cases and questions arising under the act was not intended to clothe these courts or the judges thereof with authority to interfere with the judicial action of any other court having jurisdiction, but to authorize them to hear and determine any such questions when brought before them by the parties for adjudication. It follows that the act does not exclude the jurisdiction of the State courts in actions brought by the assignee for the recovery of the estate of the bankrupt.

It is further insisted by the counsel for the appellant that the provisions of section 35 of the act, making void payments made, securities given and transfers of property by an insolvent, with a view of giving preference to any creditor, such creditor having reasonable cause to believe the debtor insolvent, and providing that the assignee may avoid such security and recover the money paid or property transferred as assets of the estate of the bankrupt, create new rights; and that, inasmuch as the act confers jurisdiction upon the District and Circuit Courts of the United States for actions brought for this purpose, the act gives a remedy for such new rights, and that the law makes such remedy exclusive. It is true that the preferences given by insolvents to creditors, declared

void by section 35 of the act, are authorized by the laws of this and most, if not all, the States where the common law has been adopted, by which an insolvent debtor is permitted to give such preferences among his *bona fide* creditors as he may choose. Taking from the debtor this right, and conferring upon the assignee the right of recovering, for the benefit of the other creditors, as the act does, the property transferred, in its attempted exercise by the debtor, is conferring upon the other creditors a new right. This right is given them by the acts manifestly upon the theory that the giving of such preferences, under the circumstances forbidden by the act, is a fraud upon the other creditors. Under the laws of the State, creditors could always recover property of their debtor, transferred by him in fraud of their rights, when the transferee is a participant in the fraud. The case, then, is this : The act makes certain transfers by the debtor fraudulent, as to his other creditors, which were not so under the laws of the State ; and the position of counsel now under consideration would deprive the State courts of jurisdiction of actions for the recovery of this property while they would have jurisdiction of actions for the recovery of property which the State law held had been transferred by the debtor to defraud his creditors. The act certainly shows no intention to create any such distinction in the jurisdiction of the State courts, and, if made, it must be sustained entirely upon other grounds.

The counsel cites *Dudley v. Mayhew*, 3 N. Y. 9, in support of his position. This was an action commenced in the Court of Chancery to restrain the infringement of a patent right, and the learned judge, in giving the opinion of the court, clearly demonstrates that this was a new right, created by the act, and that the act gave an adequate remedy for its protection, peculiar in many respects, of which the parties could not avail themselves in other courts ; and hence the conclusion, that the act, intended to make such remedy exclusive, was correct. An examination of the cases such remedy exclusive, was correct. An examination of the cases cited by the judge shows that the rule is based entirely upon the intention of the legislature, apparent from the act, to make the remedy provided for the protection of the new right exclusive. But the act in question not only shows no such intention, but the distinction upon which the jurisdiction would be made to depend would be absurd. If any assumption is to be made, it should be that none such was intended.

The counsel cites *Brigham v. Claffin*, 31 Wis. 607 ; S. C., 11 Am.

R. 623, where this distinction appears to have been made by the court as the basis of the judgment. The opinion of COLLE, J., shows that he thought a State court should not entertain jurisdiction of any action brought by the assignee for the recovery of the property of the bankrupt. I have carefully examined the reasons given by the learned judge, and am unable to concur therein. If the State courts have jurisdiction, it is not in their discretion whether or not to exercise it. It is their duty to do so, when called upon in the mode prescribed by law. I apprehend no difficulties arising from conflicting decisions of the State and federal courts in construing the act. Of such questions, arising upon this or any other act of congress, the jurisdiction of the Supreme Court of the United States is paramount, and it is the duty of all other courts to adopt the decisions of that court in regard to them, irrespective of their own views. The idea of the learned judge, that if the State courts have jurisdiction, suits will be greatly multiplied, is, I think, fallacious. It will require no greater number of actions in the State than in the federal courts to collect the estate of a bankrupt.

The right of recovery of property transferred by the insolvent, given by the thirty-fifth section, is in no sense a penalty imposed upon the party receiving it. The transfers, and titles based thereon, are thereby made void. Hence the right of recovery. The cases holding that State courts have no jurisdiction of penalties given by acts of congress, have no application to the present question.

The counsel also cites *Voorhies v. Frisbie*, 25 Mich. 476; S. C., 12 Am. R. 291. That was a suit in equity by the assignee, to set aside a conveyance made by the bankrupt, as being void under the bankrupt act. It was held that the State court had no jurisdiction of the action. The reasoning upon which the judgment was based was substantially the same as in *Brigham v. Clafin*, *supra*.

The jurisdiction of the State court is not based upon the act of congress, but wholly upon the constitution and laws of the State. The right is given by the act of congress, and I can see no reason why a right so given may not be protected in a State court in the same way and to the same extent as though the same right was derived from another source.

My conclusion is that, upon principle, the court had jurisdiction. I think the authorities sustain this conclusion. It was so held by the Supreme Court of Massachusetts, under the former bankrupt law, in *Ward v. Jenkins*, 10 Metc. 583. Such actions

were prosecuted by assignees to judgment, under the same law in many of the States, without the jurisdiction being questioned. This was known to congress at the time of the passage of the present act. With this knowledge, had there been any intention to exclude the jurisdiction of the State courts, such intention would have been expressed in clear and unmistakable language. It has been so held, under the present law, by the same court in *Stevens v. The Mechanics' Savings Bank*, 101 Mass. 109; S. C., 3 Am. R. 325; and in *Forbes v. Howe*, 102 id. 428; S. C., 3 Am. R. 475; by the Supreme Court in Indiana, in *Hastings v. Fowler*, 2 Carter, 216; and in Kentucky, in *Boone v. Hall*, 7 Bush, 66; S. C., 3 Am. R. 288; in Pennsylvania, in *Mays v. Manufacturers' National Bank*, 64 Penn. St. 74; S. C., 3 Am. R. 573, and in other cases. To these, other citations might be added, but the above are sufficient.

This brings us to the merits of the case. In the examination of these we must apply the rule, well settled in this court, that when the judgment has been affirmed by the Supreme Court, every fact found by the referee, in support of which any evidence was given, must be assumed as true by this court, and it must be also assumed that he found such further facts as are necessary to sustain the judgment, as the evidence given would have authorized. Applying this rule, it must be assumed that the defendants, at the time they received the lumber from Cressy and at the time of issuing the executions upon the judgments, had no just cause to believe him insolvent; but that, on the contrary, they believed that his property was more than sufficient for the payment of all his debts. This court cannot look into the evidence further than to ascertain whether any was given tending to show these facts. With the evidence tending to show the contrary, or its weight, the court has nothing to do. These facts constituted a defense to the claim of the plaintiff for money paid by Cressy, or for property transferred by him to the defendants. The defendants had a legal right to issue executions upon their judgments against Cressy, if valid, and have his real and personal property sold to satisfy the same pursuant to law. The sale having been fairly and legally made by the sheriff, it cannot be set aside in another action on the ground of the inadequacy of the price at which the property was sold.

The only questions presented, which are reviewable by this court, relate to the validity of the judgments confessed by Cressy to the defendants, and whether the same had been paid. The verification



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of the statement by Cressy, to one of the judgments, was upon information and belief only. This was held insufficient by this court in *Ingram v. Robbins*, 33 N. Y. 409. The defendants in their answer, as amended, sought to have the verification amended. This amendment was adjudged by the referee, and was entirely proper under the proof given, if such relief could be given in the action. That the verification was amendable by the Supreme Court, upon motion, was determined by this court in the case last cited. *Mitchell v. Van Buren*, 27 N. Y. 300, is to the same effect. In *Union Bank v. Bush*, 36 id. 631, it was held that the amendment could be obtained by an action, the same as upon motion in the original cause. See, also, note to *Chichester v. Cundee*, 3 Cow. 39. I think the amendment properly allowed, if at all necessary, as against the plaintiff.

The judgment, without the amendment, was valid against Cressy. His personal property had been sold upon the execution before the plaintiff's title attached. He took the real estate subject to all valid incumbrances; and the judgment was an incumbrance valid against all except the right of judgment creditors of Cressy to institute proceedings to set it aside. The plaintiff was not a judgment creditor of Cressy, and the bankrupt act nowhere confers upon him the rights of such a creditor.

I have examined the statements upon which the judgments were confessed, and concur in the opinion of the Supreme Court that they must be held sufficient under the latest decisions of this court. The judgments were, each in part, confessed to secure the defendants for their notes and other commercial paper, which they agreed thereafter to advance to Cressy for him to use in his business, which the defendants were to provide for at maturity, and which they did in fact advance, and which were used by Cressy prior to the issuing of the executions. The objection is that the defendants, not being liable upon such paper at the time of the confession of the judgments, there was, to this extent, no legal foundation for the judgments, and that to this extent they are void. In *Brinkerhoff v. Martin*, 3 Johns. Ch., it was held that a judgment might be confessed to secure responsibilities thereafter to be incurred. In *Truscott v. King*, 6 N. Y. 147, it was held that a judgment might be confessed to secure future advances of money, and the cases are fully examined showing for what purposes this security may be taken. It is obvious that there is no reason for permitting judgments to be

taken, to secure future advances of money, that is not equally applicable to permitting them to secure future advances of notes and other commercial paper.

But conceding that judgments confessed for these purposes prior to the Code were valid, the counsel for the appellant insists that the law, in this respect, was changed by its provisions. The Code, section 382, provides that judgments by confession may be entered without action either for money due or to become due, or to secure any person against a contingent liability on behalf of the defendant, or both, in the manner prescribed. This language, declaring the purposes for which judgments may be confessed, is very comprehensive. Money due, and money to become due, embraces all demands of a pecuniary character. In this case, money would certainly become due from Cressy to the defendants, should the latter thereafter advance or loan him money, and just as certainly should the defendants thereafter loan him their notes or other commercial paper which should be used by him, and provided for by the defendants, pursuant to the agreement between them. To secure the payment of this money, a judgment might be confessed. I think that a fair construction of the Code authorizes the confession of judgments for any of the purposes authorized by the then existing law ; but whether so or not, it authorizes such judgments for money then due, or certainly or contingently to become due, and this embraces the present case.

The counsel for the appellant insists that the evidence conclusively proves that the judgments had been fully paid prior to the issuing of the executions thereon. It does prove a receipt of money by the defendants, for lumber of Cressy, sold by them as his commission merchants, more than sufficient for that purpose. Had there been no other application of this money by agreement of the parties, or by their acts, or that of either of them, the law would have applied it upon the oldest debts, and thus have paid and extinguished the judgments. But the evidence tended to show, and the referee has found, that when the advances of the defendants in money and paper equaled the amount of the judgments, the parties agreed that the defendants should make further advances, and that the money thereafter received by them should be applied to the payment of such advances ; that, in pursuance of this agreement, further advances were made by the defendants, to the payment of which the money subsequently received by them was applied, and

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so applying it, the sums for which the executions were issued remained due upon the judgments. The fact that no separation of the accounts was made upon the books of the defendants was evidence only tending to show that no such agreement was made. We have already seen that this court is concluded by the finding.

The judgment appealed from must be affirmed.

*Judgment affirmed.*

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**VAN ZANDT V. MUTUAL BENEFIT LIFE INSURANCE COMPANY,**  
appellant.

(55 N. Y. 180.)

*Life insurance — death of assured "by his own hands." Insanity. Expert testimony.*

A person whose life is insured under a policy containing a proviso that in case he should die "by his own hands" the policy should be void, and who takes his own life, must be insane to such a degree as to render him unconscious that the act he does will cause his death, or he must commit it under the influence of some insane impulse which he cannot resist, in order to take the case out of the proviso.

In an action on a policy of life insurance, containing a proviso that in case the assured should die "by his own hands," the policy should be void, it appeared that the assured took his own life by shooting himself. The judge charged the jury that if the assured was incapable of determining whether the act which he did was right or wrong, the company was liable. *Held*, error.

On the trial of an action on a policy of life insurance where the assured had committed suicide, a medical witness was asked, "Assuming that a person had that form of insanity which you denominate melancholia, and had committed suicide, would you attribute that suicide to the disease?" *Held*, that the question was improper, as calling for no information, peculiarly within the knowledge of an expert, but for an inference which the jury were capable of drawing, if justified by the facts, without being influenced by the opinion of the witness.

ACTION by Mary A. Van Zandt against the Mutual Benefit Life Insurance Company, upon a policy of insurance of \$4,000 on the life of John J. Van Zandt, plaintiff's testator. The policy contained a proviso that in case the assured should "die by his own

hands" the policy should be void. The assured committed suicide by shooting himself, and evidence was given tending to show that he was insane at the time the deed was committed.

The court charged the jury that if the deceased was, at the time he committed the act of self-destruction, incapable of determining whether the act was right or wrong, and was not conscious of the moral obliquity of the act, he could not be said to have died by his own hand within the meaning of the terms of the policy, and the defendant was liable. The defendant excepted to this charge, and made several requests to charge, the principal of which is stated in the opinion. The requests were refused. The verdict and judgment were for plaintiff. The general term affirmed the judgment, and defendant appealed to this court.

*W. F. Cogswell*, for appellant. The court erred in instructing the jury that if deceased's reasoning powers were so far gone that he was incapable of determining whether his act in taking his life was right or wrong, or that he was not conscious of the moral obliquity of such act, then plaintiff was entitled to recover. *Weaver v. Ward*, Hob. 189; *Krome v. Schoonmaker*, 3 Barb. 647; *Borradaile v. Hunter*, 5 M. & G. 639; *Clift v. Schwabe*, 3 M. G. & S. 437; *Dorway v. Borradaile*, 10 Beav. 342; *Dufaur v. Prof. L. As. Co.*, 26 id. 602; *Dean v. Am. Life Ins. Co.*, 4 Allen, 96; *Cooper v. Mass. Ins. Co.*, 102 Mass. 227; S. C., 3 Am. R. 451; *Hartman v. Keystone Ins. Co.*, 21 Penn. St. 466; *St. Louis Life Ins. Co. v. Graves*, 6 Bush, 268; *Breasted v. F. L. & T. Co.*, 4 Hill, 73; 4 Seld. 299.

*George F. Danforth*, for respondent. Evidence as to the sanity of the deceased was proper. *Bartholemy v. People*, 2 Hill, 248, 257, and note *b*. The legal presumption is, his death was not caused by a suicidal act. *Mallory v. Trav. Ins. Co.*, 47 N. Y. 54. The words used in the condition of the policy as to suicide are not to be taken literally. *Wells v. Conn. Ins. Co.*, 48 N. Y. 34. They are words of forfeiture and must be construed strictly. *Hill v. Grange*, Plowd. 171; *Lofield's case*, 10 Rep. 106, *b*; *Blackett v. Royal Ex. As. Co.*, 2 Cr. & Jer. 244-251. They are to be construed against defendant. *Grant v. Lex. F. Ins. Co.*, 5 Md. 23. Applying these rules, the words relate only to criminal acts of self-destruction. *Hales v. Pett*, Plowd. 261; *Breasted v. F. L. &*

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*T. Co.*, 4 Hill, 75 ; 22 Edw. 3 ; Fitz Abridgt. ; *Easterbrook v. Un. M. L. Ins. Co.*, 54 Me. 224 ; Bunyan on L. Ins. 73 ; Phil. on Ins. 503 ; *State v. Filter*, 25 Iowa, 67 ; *Terry v. Mut. L. Ins. Co. of N. Y.*, 1 Dillon, 404 ; 15 Wall. 580.

RAPALLO, J. The policy sued upon in this action contained the usual condition that in case the assured should die by his own hand the policy should be void. He took his own life by shooting himself, but the evidence tended strongly to show that he was at the time insane. The court, among other things, submitted to the jury the question whether the assured was at the time of his self-destruction incapable of determining whether the act was right or wrong, and not conscious of its moral obliquity. The case distinctly presents the question whether that degree of mental disorder is sufficient to prevent the act of self-destruction from operating as a breach of the condition and avoiding the policy, notwithstanding that the assured retained at the time sufficient power of mind and reason to understand the physical nature and consequence of the act by which he destroyed his own life, and it was voluntarily and willfully committed by him with the purpose and intention of causing his own death.

This question is raised by exceptions to the charge ; but especially by exceptions to refusals of requests to charge, framed with reference to the precise point.

The charge, considered independently of the requests, directed the attention of the jury to other inquiries touching the sanity of the deceased, in connection with the question of his consciousness of the moral obliquity of his act, and might be sustained as not resting solely upon the question of moral responsibility. But the requests to charge, and their refusal by the court, clearly raised the question first stated.

The defendant's counsel, among other things, requested the court to charge, that if the act of self-destruction was the voluntary and willful act of the deceased, he having at the time sufficient power of mind and reason to understand the physical nature and consequences of such act, and having at the time a purpose and intention to cause his own death by the act, it avoided the policy. This request was refused, and exception was duly taken.

The rule is well settled in England in conformity with the request. It is there held that a voluntary and intentional self-

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destruction by the insured is within the proviso, notwithstanding that he was at the time incapable of appreciating the moral quality of the act, and that his capacity to appreciate its moral nature is not a material question, except as bearing upon the inquiry whether he had sufficient mental capacity to understand its physical consequences and was in possession of his power of will. The leading cases upon this subject are *Borradaile v. Hunter*, 5 Man. & Gr. 639, and *Clift v. Schwabe*, 3 Man. Gr. & Scott (3 C. B.), 437.

According to those decisions, to take a case out of the proviso, the party must have been insane to such a degree as to render him unconscious that the act he did would cause his death, or he must have committed it under the influence of some insane impulse which he could not resist. His mind must have been so far gone that it was not moving to the act. It is not sufficient that his moral sense was so impaired as to deprive the act of its criminal character.

It is contended that the case of *Breasted v. The Farmers' Loan and Trust Co.*, 4 Hill, 73, and 8 N. Y. 299, establishes a different doctrine in this State. In 4 Hill, 73, the case came before the court on demurrer to a replication, which averred that when the assured drowned himself he was of unsound mind and wholly unconscious of the act. NELSON, Ch. J., in delivering the opinion of the court, placed his decision upon the ground that, speaking legally, such drowning was no more the act of the assured than if he had been impelled by irresistible physical power. The learned judge also intimates that the connection in which the words stand in the policy would seem to indicate that they were intended to express a criminal act of self-destruction, as they are found in conjunction with the provisions relating to the termination of the life of the insured in a duel, or his execution as a criminal. But he does not place the decision on that ground, nor could it well stand there if the language of the policy in that case was the same as in the present, because in this policy the provisions in conjunction with which the words are used relate as well to acts not criminal, as to criminal acts; the same sentence embracing the visiting of prohibited territories, engaging in service upon the sea, or in military service, death from intemperance, etc. The maxim *noscitur a sociis* cannot therefore afford a reliable rule of interpretation. See opinion of GROVER, J., in *Bradley v. Mutual Benefit Life Ins. Co.*, 45 N. Y. 434.

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In 8 N. Y. 299, the case of *Breasted* came before the Court of Appeals on appeal from the decision of the Supreme Court upon the demurrer, and also upon a judgment on the report of a referee on issues of fact which had been joined in the action. The referee had found that the assured threw himself into the river, while insane, for the purpose of drowning himself, not being mentally capable at the time of distinguishing between right and wrong. There was no finding that the act was voluntary or willful. Such a finding would have established that the man was not deprived of his power of will, and that he could have restrained himself from the commission of the act, and would have negated any insane impulse which he could not resist. Bearing in mind the well-established principles upon which judgments based upon findings of fact by a court or referee are reviewed in this appellate tribunal, and that, in regard to matters of fact, all intendments, of which the evidence in the case or the findings are fairly susceptible, must be in support of such judgments, and that the finding, in general terms, of insanity may have comprehended a deprivation, not merely of moral sense, but of any rational will, the court could hardly have come to any other conclusion than it did. The whole reasoning of the opinion of WILLARD, J., which prevailed over the dissents of GARDNER, JEWETT and JOHNSON, JJ., shows that he regarded the point raised upon the demurrer—viz., that the assured, at the time of destroying his own life, was of unsound mind and wholly unconscious of the act, and that presented by the finding as identical, and that the learned judge regarded the finding as establishing that the assured was so insane as not to be capable of forming an intention, and that he had not sufficient mind to concur in the act. The learned judge does not undertake to overrule the cases of *Borradaile v. Hunter* and *Clift v. Schwabe*, but expressly distinguishes those cases from the one before him by pointing out that they assumed that the act was voluntary, which fact he holds that the finding in the case of *Breasted* failed to establish.

A finding in the language of the request in the present case, that the deceased had sufficient power of mind and reason to understand the physical nature and consequences of the act, and that he committed it voluntarily and willfully, and in pursuance of a purpose and intention thereby to cause his own death, would have established that insanity did not exist to such a degree as to prevent him

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from forming an intention, or being conscious of the act he was doing. It would have established that his mind did concur with the act, and that this act, being voluntary, was not the result of any insane impulse or want of power of self-control. Whether so much power of reasoning and self-control could be left in a mind so impaired as to be incapable of appreciating the moral obliquity of the crime of suicide, is rather a scientific than a legal question. Judge WILLARD, in the *Breasted case* (8 N. Y. 305), expresses the opinion that a man so insane as to be incapable of discerning between right and wrong can form no intention. This, it must be observed in passing, is a much broader proposition than that the failure to appreciate the wrong of a particular act evinces a total deprivation of reason. The loss of moral sense, even to that extent, in one who had previously possessed it, would, undoubtedly, be a fact bearing strongly upon the question whether he retained his other faculties. But in the practical administration of justice, in cases of this description, it seems to us a dangerous doctrine to hold that the attention of the jury should be directed principally to the degree of appreciation which the deceased had of the moral nature of his act, and that this question, most speculative and difficult of solution, should be made the test by which it should be determined whether he had knowingly and voluntarily violated the condition of his insurance. The real question is, whether he did the act consciously and voluntarily, or whether, from disease, his mind had ceased to control his actions. Supposing a man to be in possession of his will and of the ordinary mental faculties necessary for self-preservation, but that his mind has become so morbidly deceased on the subject of suicide that he cannot appreciate its moral wrong, and in this condition of mind he takes his own life voluntarily and intentionally—perhaps with the very object of securing to his family the benefits of an insurance upon his life—it is difficult to say that this is not a death by his own hand within the meaning of the policy.

It has been doubted whether public policy would permit an insurance covering the case of intentional suicide, by the insured, while sane. But however this may be, no rational doubt can be entertained that a condition exempting the insurers from liability in case of the death of the assured by his own hand, whether sane or insane, would be valid if mutually agreed upon between the insurer and the insured. When nothing is said in the policy with respect to



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insanity, the words "die by his own hand," in their literal sense, comprehend all cases of self-destruction. The exceptions which have been engrafted upon these words by judicial decisions must rest upon the ground that the excepted cases could not have been within the meaning of the parties to the policy. The intent on the part of the insurer in inserting the condition is evident. The policy creates in the assured a pecuniary interest in his own death. To a man laboring under the pressure of poverty and the urgent wants of a dependent family, or of inability to discharge sacred pecuniary obligations, or other similar causes, the policy offers a temptation to self-destruction. To protect the insurers against the increase of risk arising out of this temptation is the object for which the condition in question is inserted. Per MAULE, J., 5 M. & Gr. 653. The condition ought, therefore, to be so constructed as to exclude only those cases in which these motives could not have operated — such as accident or delirium. Ibid.

So far as considerations of public policy have any place in determining such a question, they are undoubtedly in favor of confining the exceptions to the condition to cases in which the self-destruction is clearly shown to have been accidental or involuntary.

I do not find that any of the cases have gone so far as to adjudicate that the mere want of capacity to appreciate the moral wrong involved in the act, where it was voluntary and intentional, unaccompanied by any want of appreciation of its physical nature and consequences, or by any insane impulse or want of power of will or self-control, is sufficient to take a case out of the proviso.

The contrary has been held in several cases, and the doctrine of *Borradale v. Hunter* adopted. *Dean v. The American Mutual Life Ins. Co.*, 4 Allen, 96; *Cooper v. The Massachusetts Mut. Life Ins. Co.*, 102 Mass. 227; *Nimick v. Ins. Co.*, 10 Am. Law Reg. (N. S.) 102; *Gay v. Union Mutual Life Ins. Co.*, 9 Blatchford, 142; 2 Bigelow's Life and Accident Cases, etc., 4; Wharton & Stille's Med. Jur., § 240; *Fowler v. The Mut. Life Ins. Co. of N. Y.*, 4 Lans. 202. In the case of *St. Louis Mut. L. Ins. Co. v. Graves*, 6 Bush, 268, the Court of Appeals of Kentucky was equally divided.

The only case cited in support of the respondent's view, in addition to the case of *Breasted v. The Farmers' Loan and Trust Co.*, which has already been commented upon, is the case of *Terry v. Life Insurance Co.*, 15 Wall. 580. But it will be found, upon an examination of that case, that the question of the capacity of the deceased

to appreciate the moral character of the act was not involved, and that all that is said upon that subject in the opinion is *obiter*. The judge at the trial expressly instructed the jury that it was not every degree of insanity which would so far excuse the party taking his own life as to make the party insuring liable; but that the mind of the deceased must have been so far deranged as to have made him incapable of using a rational judgment in regard to the act he was committing, or he must have been impelled by some insane impulse which the reason that was left him did not enable him to resist. Not a word was said to the jury in respect to his consciousness of the moral quality of the act. 1 Dillon's C. C. R. 404. The requests to charge, which were refused, required the submission to the jury only of the question of the capacity of the deceased to understand the nature and consequences of the act, and did not require them to find that it was voluntary, and, therefore, did not exclude the hypothesis of an insane impulse which he could not resist.

The questions raised by the exceptions in that case differ widely from the present, and the judgment therein is not inconsistent with the doctrine of *Borradaile v. Hunter* and the other cases cited. The opinion delivered in the Supreme Court in the *Terry case* contains some general language which goes far beyond the charge in the Circuit Court, and was not necessary to sustain the judgment. I refer to that part of the opinion which is relied upon in the points of the respondent in this case, and in which the learned judge says, that "if the death is caused by the voluntary act of the assured, he knowing and intending that his death shall be the result of his act, but when his reasoning faculties are so far impaired that he is not able to understand the moral character, the general nature, consequences and effect of the act he is about to commit, or when he is impelled thereto by an insane impulse which he has not the power to resist," the insurer is liable.

The precise effect of this passage is not very clear to us, as it includes several conditions which can hardly co-exist. It can be conceived that the act might have been voluntary and the self-destruction intentional, though the assured failed to appreciate its moral character; but it is difficult to conceive how the act could have been voluntary and intentional when the faculties of the deceased were so impaired that he was not able to understand "the general nature, consequences and effect of the act he was about to

commit," or when he was impelled thereto by an insane impulse which he had not the power to resist.

Even if the decision in the Terry case were an authority binding upon us, we should not regard it as overruling the case of *Borradale v. Hunter*, and kindred cases. The first request to charge was framed in accordance with the doctrine of those cases, and we think that it should have been granted.

An exception to a ruling upon evidence is also urged on the part of the appellant.

On the trial the following question was put by the plaintiff's counsel to Dr. Dean, a medical witness, called on the part of the plaintiff: "Assuming that a person had that form of insanity which you denominate melancholia, and had committed suicide, you would attribute that suicide to the disease?" This question was objected to and admitted, and the witness answered, "Yes, I should attribute it as the result of insanity."

We think that the exception to the admission of this evidence was well taken. The question called not for any fact or information peculiarly within the knowledge of an expert for the purpose of guiding the jury in coming to a conclusion, but for the inference of the witness from a supposed fact, which inference the jury were capable of drawing, and which it was within their province to draw, if justified by the facts proved, without being influenced by the opinion of the witness. *Kennedy v. The People*, 39 N. Y. 255-257.

There should be a new trial, with costs to abide the event.  
All concur.

*Judgment reversed and new trial granted.*

## COLLENDER, appellant, v. DINSMORE.

(55 N. Y. 300.)

*Parol evidence — explanation of express company's receipt. Custom and usage.*

Words or forms of expression, in a written instrument, not in universal use, but local or technical words, or phrases having two meanings, one common and universal, the other peculiar, technical or local, and characters, marks and technical terms used in a particular business, may be explained by parol evidence.

Custom and usage can be resorted to for the purpose of ascertaining and explaining the intention of the parties to a contract when it cannot be ascertained without parol evidence, but never for the purpose of contradicting or qualifying express and certain provisions.

Plaintiffs delivered goods to defendant's express company, consigned to "A. King, Clifton House, Windsor, N. S., C. O. D., \$375. From Turner's Express, Boston, Mass." The receipt given to plaintiffs exempted defendant's company from liability beyond its route. Defendant's route terminated at Boston, and there connected with Turner's Express, which transported goods from Boston to Windsor. In an action by plaintiffs against defendant for an alleged breach of the contract of transportation, *held*, (1) that parol evidence was admissible to explain the meaning of the letters "C. O. D.," but not the meaning of the remaining words; and (2) that it was inadmissible to show that it was the custom and usage among connecting express companies transporting goods marked "C. O. D." to transfer the goods with the bill to the succeeding line, and await return of proceeds. The direction was plain to collect \$375 from Turner's Express.

ACTION by Hugh W. Collender and another against William B. Dinsmore, president of the Adams Express Company, to recover for an alleged breach of a contract for the transportation of goods. In November, 1861, plaintiffs delivered to the Adams Express Company at New York goods valued at \$375, receiving therefor, a receipt in the form :

"Received of Phelan & Collender two boxes merchandise and two cases slate, comprising one billiard table, marked :

"A. KING, Clifton House,

"Windsor, N. S."

"C. O. D. \$375,

"From Turner's Express, Boston, Mass."

The receipt contained a clause, among others, that the company would "in no event, be liable beyond our route as herein receipted." Defendant's route terminated at Boston, and there connected with Turner's Express, which transported goods to Windsor.

On the trial, defendant was allowed, under objection, to ask several witnesses what the words, "A. King, Clifton House, Windsor, N. S., C. O. D. \$375, from Turner's Express, Boston, Mass." meant, and they replied that it meant, that the \$375 was to be collected of A. King by Turner's Express. The witnesses were allowed to testify, under objection, as to the custom and usage among connecting express companies receiving packages marked "C. O. D." destined to a point beyond the line of the first company. They testified that the custom was to transfer goods with the bill to the succeeding line and await return of proceeds. It appeared that the letters "C. O. D." meant "collect on delivery," and that the words "From Turner's Express" were not common in receipts, the usual form being "C. O. D." with the amount. Plaintiff offered to show that before the goods were delivered to defendant's company, it was agreed that the company would collect of Turner's Express on delivery. This was rejected. Judgment in favor of defendant entered on the report of a referee was affirmed at general term. The plaintiff appealed to this court.

*M. Nolan*, for appellant. Evidence of custom or usage is admissible to explain terms in a contract only where these terms are unusual. 1 Greenl. Ev., § 295; 2 Cowen & Hill's Notes, p. 506. The only testimony admissible on the trial was testimony explaining the initials, "C. O. D." *Dana v. Fiedler*, 12 N. Y. 40; *Hurlbut v. Carver*, 37 Barb. 62; *Ins. Cos. v. Wright*, 1 Wall. 456; *Robinson v. United States*, 13 id. 363; *Collyer v. Collins*, 17 Abb. Pr. 467. No evidence of custom or usage is admissible to vary or control the legal effect of a written instrument, or to contradict the express or implied terms of one. *Wrigglesworth v. Dallison*, 1 Smith's Lead. Cas. 670; *Bradley v. Wheeler*, 44 N. Y. 495; *Markham v. Jaudon*, 41 id. 235; *Moore v. Higgins*, 35 id. 422; *Wheeler v. Newbold*, 16 id. 401; *Dalton v. Daniels*, 2 Hilt. 472; *Bargett v. Or. Mut. Ins. Co.*, 3 Bosw. 383; *St. N. Ins. Co. v. Merc. M. Ins. Co.*, 5 id. 238; *Barnard v. Kellogg*, 10 Wall. 383; *Cooper v. Kane*, 19 Wend. 386; *Hunter v. Locke*, 5 Hill, 439; *Furness v. Cone*, 8 Wend. 247; *Main v. Eagle*, 1 E. D. S. 619. Extrinsic evidence of custom is admissible to

annex incidents to contracts, in matters in respect to which they are silent, only when the incident to be annexed is consistent with the terms of the written instrument. *Hatton v. Warren*, 1 M. & W. 474; *Smith's Lead. Cas.* 675, 677. It was error to exclude plaintiffs' offer to prove, when defendant rested, that the latter had agreed with him that, instead of intrusting the goods to Turner's Express, under the custom, it would collect amount on delivery from Turner's Express. *The Schooner Reside*, 2 Sumn. 567; *Knox v. The Ninette*, Crabbe, 534; *Wolfe v. Howes*, 20 N. Y. 197; *Hunt v. H. R. Ins. Co.*, 2 Duer, 481; Stephen on Pl. 450.

*Charles M. De Costa*, for respondent. Defendant did not receive the goods as a common carrier, but under the contract in the express receipt, by which the rights and liabilities of the parties are to be determined. *Belger v. Dinsmore*, 51 N. Y. 166; *Long v. N. Y. C. R. R. Co.*, 50 id. 76. Evidence is always admissible to explain the meaning of words or forms of expression used in any particular business when their meaning is essential in construing a contract. *Dana v. Fiedler*, 12 N. Y. 40, 46; 1 Greenl. Ev., § 282. Evidence of custom or usage is admissible to explain the meaning and intent of the parties to a contract, which could not be explained without the aid of this extrinsic evidence. *Wrigglesworth v. Dal-lison*, *Smith's Lead. Cas.* (Law Lib., N. S., 3), note, p. 223; *Collyer v. Collins*, 17 Abb. Pr. 467; *Spear v. Hart*, 3 Rob. 420; *Barnard v. Kellogg*, 10 Wall. 383; *Robinson v. United States*, 13 id. 363; *Walls v. Bailey*, 49 N. Y. 464; *Dent v. N. A. S. S. Co.*, 49 id. 390; *The Richmond*, 1 Bis. 49; *McMasters v. Penn. R. R. Co.*, 69 Penn. 374. Defendant's liability for the goods was discharged at the end of its route, upon delivery of the goods to Turner's Express. *Am. Ex. Co. v. Second Nat. Bank*, 69 Penn. 394; *Reed v. U. S. Ex. Co.*, 48 N. Y. 462; *Babcock v. L. S. & M. S. R. R. Co.*, 49 id. 49. A written agreement merges all previous conversations and negotiations between the parties, and must be held to express the true agreement of the parties upon the matters therein referred to. *Dela-field v. Degrau*, 9 Bosw. 1; *Buckley v. Bentley*, 48 Barb. 283; *Bush v. Tilley*, 49 id. 599; *Renard v. Sampson*, 12 N. Y. 561; *Halliday v. Hart*, 30 id. 474; *Pollen v. Le Roy*, id. 549; *Thorp v. Ross*, 4 Keyes, 546; *Riley v. City of Brooklyn*, 46 N. Y. 44; *Long v. N. Y. C. R. R. Co.*, 50 id. 76.

ALLEN, J. The counsel for the respondent is entirely right in his claim that the receipt of the express company, given to the consignor of the goods at the time of their receipt for transportation, is the contract by which the rights and obligations of the parties must be determined, and that, in the absence of fraud or mistake, the terms of the contract cannot be varied by parol or other extrinsic evidence, or by evidence of prior negotiations which were merged in the written contract. *Long v. N. Y. C. R. R. Co.*, 50 N. Y. 76; *Belger v. Dinsmore*, 51 id. 166; S. C., 10 Am. R. 575.

The contract, when interpreted with such aids as the law permits, either by proof of extrinsic facts and circumstances within the knowledge of the parties, and in respect to which it was entered into, or of usage or custom, which may be regarded as incorporated in the contract and made a part of it, must be performed, and effect be given to it according to its terms.

Certain extrinsic facts are admitted which explain what would otherwise be ambiguous on the face of the written receipt. The receipt is of goods consigned to one King, at Windsor, Nova Scotia, and, without explanation or evidence of extrinsic facts, or some limitation in the contract itself, it would be presumptively a contract for their carriage by the defendants and a delivery of them to the consignee at their place of destination, according to this direction. The contract in terms provides, however, that the Adams Express Company shall not be liable beyond the route of that company, and the admission is that defendant's line terminated at Boston and there connected with Turner's Express, carrying merchandise between Boston and Windsor, and by whom the goods were to be forwarded from Boston to their place of destination. The liability of defendant's company in respect to the carriage of the goods, terminated with the delivery to Turner's Express at Boston, and the reference to that express in the body of the receipt is made intelligible by the knowledge of these facts, and especially by the fact that such express was the carrier connecting with the defendant at Boston. *Field v. Munson*, 47 N. Y. 221. The letters "C. O. D.," followed by an amount in dollars, have come to be very well understood in the community and by the public, but perhaps could not, without the aid of extrinsic evidence, be read and interpreted by the courts; that is, their meaning may not be considered as judicially settled, or so well understood that judicial notice can be taken of the purpose for which those letters are used.

in the connection in which they are here found, or the contract to be implied from them. It was certainly competent to explain them, and thus remove all ambiguity by parol evidence.

The rule is that words, or forms of expression which are not of universal use, but are purely local or technical, may be explained by parol evidence, and the same is true of words or phrases having two meanings, one common and universal, and the other peculiar, technical or local. In such case parol evidence may be given of facts tending to show in which sense the words were used. 1 Greenl. Ev. 295. Where characters, marks or technical terms are used in a particular business, unintelligible to persons unacquainted with such business, and occur in a written instrument, their meaning may be explained by parol evidence, if the explanation is consistent with the terms of the contract. *Dana v. Fredler*, 12 N. Y. 40; *Barnard v. Kellogg*, 10 Wall. 383; *Robinson v. United States*, 13 id. 363; *Wells v. Bailey*, 49 N. Y. 464; *Attorney-General v. Shore*, 11 Sim. 616.

The evidence clearly explains the use of the letters referred to, and, as used, they stand for and represent certain words of which they are the initials, and constitute, in an abbreviated form, a direction well understood to collect the sum of money indicated by the figures following; and the direction, when making a part of a contract for the carriage of merchandise, as in this case, implies a contract on the part of the carrier to collect the sum mentioned, and return the same to the consignor of the goods. The contract will then be read as if it was written at large, "Collect on delivery \$375 from Turner's Express, Boston." Had the direction been merely to collect on delivery \$375, there would have been no occasion for parol evidence, as there would have been no ambiguity. It would have been interpreted as a direction to collect the amount named of the ultimate consignee, upon a delivery of the goods to him by the last carrier, and intermediate carriers would not have been called upon to advance the amount on receipt of the goods. This interpretation, which is but the natural and ordinary meaning of the language used, is in accordance with the usage and custom as proved, and the interpretation of contracts in that form by those engaged in the business of carrying goods by express and as understood in that business. All the witnesses agree to this. Had the direction then, in this case, been in this form, "C. O. D." which the witnesses all say is the usual form, it would have ev



enced a contract, upon the proof spread out upon the record as to the signification of these letters, by the defendant to carry the goods safely to Boston, and then deliver them to Turner's Express, with the same direction, and the obligation of the latter company to collect the money of the consignee at Windsor, on delivery of the goods to him.

To the usual symbolical direction ordinarily accompanying merchandise by express, subject to charges, are the words, "from Turner's Express, Boston," so that it reads "Collect on delivery \$375 from Turner's Express, Boston." The addition was not essential to limit and did not affect the liability of the defendants as carriers of the goods, and the printed receipt and contract protected them against liability beyond their route, and they were not necessary or usual to insure a collection by the last carrier, on a delivery to the ultimate consignee. The words, "from Turner's Express Company," are not ambiguous or uncertain, and are not made so by reference to any extrinsic fact, even if it were competent to create an ambiguity by extrinsic evidence. The words, or like words, when used in the same connection, have not acquired by usage or custom any peculiar or technical meaning, for all the witnesses agree that they have never known of these words, or words of a like import, being used in a contract of this character. The direction is a very plain and direct one to collect \$375 from Turner's Express, and can only be read as a direction to collect from that company, on delivery of the goods to it, the sum mentioned; and it can only receive another or different interpretation by a change in the language used, as by inserting "by" in place of "from," or by some other change which would give the phrase a meaning different from that which it would, in the language which the parties have used, ordinarily have. The evidence of the meaning put upon the simple direction to "collect on delivery," by usage, does not aid in interpreting a direction so entirely different as this is, by the addition of a very material clause. The right of the parties to make a different contract cannot be denied them, and every contract must be interpreted according to its peculiar terms, and a change so essential as this cannot be assumed to have been made unintentionally. The words added to the usual contract are of familiar and universal use, and have a well-defined meaning; they are not technical or peculiar, or used only in a particular business;

and there is no evidence that they were ever used in any other than the usual and ordinary sense.

It was not competent for the defendants to prove the meaning of the contract ; they could only prove the peculiar meaning of technical words used ; and if words of universal use were used in a technical or peculiar sense, they could prove facts tending to show that they were thus used ; but this being done it was for the court to interpret the contract. *Hutchison v. Bowker*, 5 M. & W. 535. Neither was it competent for the plaintiff to prove a custom or usage inconsistent with the terms of the contract ; and, if the language was explicit, it could not be varied or contradicted by parol evidence, or meaning given to the contract different from that called for by its terms. TYNDAL, Ch. J., in *Attorney-General v. Shore*, *supra*, says : "The general rule I take to be, that, when the words of any written instrument are free from ambiguity in themselves, and when external circumstances do not create any doubt or difficulty as to the proper application of those words to claimants under the instrument, or the subject-matter to which the instrument relates, such instrument is always to be construed according to the strict, plain, common meaning of the words themselves ; and that in such case evidence dehors the instrument, for the purpose of explaining it according to the surmised or alleged intention of the parties to the instrument, is utterly inadmissible."

Custom and usage is resorted to only to ascertain and explain the meaning and intention of the parties to a contract when the same could not be ascertained without extrinsic evidence, but never to contravene the express stipulations ; and if there is no uncertainty as to the terms of a contract, usage cannot be proved to contradict or qualify its provisions. *Barnard v. Kellogg*, *supra* ; *Bradley v. Wheeler*, 44 N. Y. 495 ; *Wheeler v. Newbould*, 16 id. 392 ; *Walls v. Bailey*, 49 id. 464. In matters as to which a contract is silent, custom and usage may be resorted to for the purpose of annexing incidents to it. *Hutton v. Warren*, 1 M. & W. 466 ; *Wrigglesworth v. Dallison*, 1 Doug. 201. But the incident sought to be imported into the contract must not be inconsistent with its express terms or any necessary implication from those terms. Note to *Wrigglesworth v. Dallison*, 1 Smith's Leading Cases (6 Am. ed.), 677, and cases cited. Usage is sometimes admissible to add to or explain, but never to vary or contradict, either expressly or by implication, the terms of a written instrument.

or the fair and legal import of a contract. *Allen v. Dykers*, 3 Hill, 593; *Hinton v. Locke*, 5 id. 437; *Mages v. Atkinson*, 2 M. & W. 442; *Adams v. Wordley*, 1 id. 374, and other cases cited; 1 Smith's Leading Cases, *supra*, 680, *et seq.* As before suggested, there was no evidence of any usage which could add to, vary or affect, in any way, the meaning of the words "from Turner's Express, Boston."

They are to receive the interpretation and have the meaning given them which they have, as universally used; and in no way can they be read except as a direction to collect the money specified from Turner's Express, on the delivery of the merchandise to that company. Whether such a direction was reasonable or unreasonable is not for us to consider. It was not difficult to observe by the defendants; and if the connecting carrier did not choose to accept the goods and make the advance, the contract of the defendants was performed by a tender of the goods; and if refused they could return them to the plaintiffs and demand compensation for the service. It cannot, certainly, be said to be unreasonable. It may have been that, while the consignees were willing to intrust the collection of the charges to the defendants, they had not the same faith in the solvency or integrity of any connecting carrier; or they may have been unwilling to have their funds in the possession of agents so far from them. It was entirely competent for the carriers to make a contract in the precise terms in which this was made; and a contract does not, like a custom, depend upon its reasonableness for its validity. The defendants ran no risk in carrying valueless property, subject to heavy charges, as suggested by the counsel; they risked nothing but the freight, and in this instance they knew the consignors and the character of the property received.

But if it can, upon any view of the terms of the direction, or the evidence given in respect to the words or phrases employed, be claimed that the words were used in a sense and with a meaning other than that which ordinarily attaches to them, it may be questionable whether the court should have excluded the evidence offered by the plaintiff, that the defendants had agreed to receive and carry the goods upon the terms indicated by the terms of the direction. It is true that, as a contract or agreement, the prior verbal negotiations and parol undertaking were merged in the written contract; but there are cases holding, in effect, that the prior negotiations and conversation of the parties can be given in evidence, when there

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is an ambiguity, to show in what sense particular words or phrases were used by the parties in making the contract. *Selden v. Williams*, 9 Watts, 9; *Gray v. Harper*, 1 Story, 574; *Kemble v. Lull*, 3 McLean, 272. But, without passing upon the question, we may say that its exclusion cannot be sustained, on the ground that it was offered too late. It was strictly replicatory, in answer to the evidence on the part of the defendant, and could not have been with propriety offered, as a part of the plaintiffs' case, before evidence had been given of the custom and usage of the meaning of the contract, as claimed by the defendants.

But, for the reason before assigned, the judgment must be reversed, and a new trial granted.

All concur, except GROVER and RAPALLO, JJ., dissenting.

*Judgment reversed.*

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NATIONAL BANK OF COMMERCE IN NEW YORK V. NATIONAL  
MECHANICS' BANKING ASSOCIATION OF NEW YORK, appellant.

(55 N. Y. 211.)

*Forgery — check raised after certification — rights of drawee.*

A bank which pays a check which it has certified, but which was altered by raising the amount, after certification, is not estopped from recovering back the money paid. It is bound only as to the signature of the drawer and its own certification.

3. obtained from V. & Co. a check, dated February 15, on plaintiff's bank for \$58.75, which the bank certified. G. then altered the amount of the check by raising it to \$15,000, and altered the date, making it February 16. He deposited it with defendant's bank on the same day with other deposits, amounting in all to \$20,000. Afterward, on the same day, he drew from defendant's bank all his deposits except about \$2,600. On the 17th of February the check was passed through the clearing-house to plaintiff's bank, where it was charged to V. & Co.'s account. Seven days afterward the account of V. & Co. was written up, and on March 1 they discovered the alteration and notified plaintiff's bank, whose officers immediately notified defendant. *Held*, that plaintiff was entitled to recover back the amount of the check from defendant, less the original amount, plaintiff not being estopped by payment of the check, and defendant's loss not being the consequence of plaintiff's mistake.

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**ACTION** by the National Bank of Commerce in New York against the National Mechanics' Banking Association of New York, to recover back money paid by mistake. On February 15, 1870, one Greenleaf procured a check for \$56.75 from Vermilye & Co., dated that day, and drawn on plaintiff's bank. The plaintiff certified it the same day, and Greenleaf then altered it by changing the date to February 16, and raising the amount to \$15,006. He deposited the check on the same day, with other deposits, amounting in all to \$20,000, with defendant's bank; and later, on the same day, he drew out his deposits, with the exception of \$2,626.24. Greenleaf was a customer of defendant. The check was paid at the clearing-house on the 17th of February, and was sent to plaintiff's bank, where it was charged to the account of Vermilye & Co. Their account was written up on February 24, and on March 1 they discovered the alteration and notified plaintiff. The officers of plaintiff's bank immediately gave notice to defendant, and repayment of the money was demanded and refused. Plaintiff obtained a verdict for the amount of the check, less the original amount, with interest. Judgment on the verdict was affirmed at general term, and defendant appealed to this court.

*James Emott*, for appellant. By certifying a check a bank becomes the debtor of the holder, and primarily liable as the acceptor of a bill. *Mead v. Mechanics' Bank*, 25 N. Y. 148. Plaintiff is estopped from denying the validity and authenticity of the certification. *Oddie v. Nat. City Bank*, 45 N. Y. 735. It was negligence for plaintiff to pay the check without observing that it had been raised; and it was therefore error to direct a verdict upon the check. *Canal Bank v. Bank of Albany*, 1 Hill, 287; *Bank of Commerce v. Union Bank*, 3 N. Y. 230; *Gloucester Bank v. Salem Bank*, 17 Mass. 42. It was error to refuse to submit to the jury the question whether defendant was injured by plaintiff's negligence or laches in giving notice of the alleged mistake. *Watkins v. Johnson*, 3 B. & C. 428; *Smith v. Mercer*, 6 Taunt. 76; *Cocks v. Masterman*, 9 B. & C. 902; *Union Nat. Bank v. Sixth Nat. Bank*, 43 N. Y. 452; *Irving Bank v. Wetherald*, 36 id. 335; *Duncan v. Berlin*, N. Y. Ct. App.; *Meade v. Merch. Bank of Albany*, 25 N. Y. 143. A party who pays what purports to be his own paper has the greatest means of knowledge; and an innocent third party, free from negligence, should not suffer. *United States Bank v. Bank*

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of Georgia, 10 Wheat. 333; *Price v. Neale*, 3 Burr. 1354; *Gloucester Bank v. Salem Bank*, 17 Mass. 42; *Burrill v. Watertown Bank*, 51 Barb. 105; *Mather v. Lord Maidstone*, 18 C. B. 273.

*Benjamin D. Silliman*, for respondent. A bank, by certifying a check drawn on it, warrants only the genuineness of the drawer's signature and that he has the amount of the check to his credit. *Bank of Com. v. Union Bank*, 3 N. Y. 230, and cases cited; *Canal Bank v. Bank of Albany*, 1 Hill, 287; *Farmers', etc., Bank v. B. & D. Bank*, 14 N. Y. 623; S. C., 16 id. 125. From the time defendant stamped the check and sent it to the clearing-house he became the guarantor of its genuineness to all subsequent *bona fide* takers. Chit. on Bills (ed. 1849), 245; *Jones v. Ryde*, 5 Taunt. 488; *Wilkinson v. Johnson*, 3 B. & C. 428; *Herrick v. Whitney*, 15 Johns. 240; *Harrison v. Bradley*, 7 Yerg. 310; Story on Bills, §§ 110, 235; *Rex v. Biggs*, 3 P. Wms. 419; *Yarborough v. Bank of England*, 16 East, 12; Story on P. N., § 121, and cases cited. Plaintiff would not be liable for delay in making the discovery, but at most for delay in giving notice after the discovery was made. *Weisser v. Denison, Prest., etc.*, 10 N. Y. 68; *Kingston Bank v. Eltinge*, 40 id. 391; *Townsend v. Crowdy*, 8 C. B. (N. S.) 476-492; *Kelly v. Solari*, 9 M. & W. 54; *Dails v. Lloyd*, 12 Q. B. 531 (64 E. C. L.); *Lucas v. Warrack*, 1 M. & R. 293; 2 Smith's Lead. Cas. (2d ed.) 1873; *Marriott v. Hampton*, and cases cited, marg. page 402; *Canal Bank v. Bank of Albany*, 1 Hill, 291; *Bank of Com. v. Union Bank*, 3 Comst. 236.

RAPALLO, J. It is now settled, both in England and in this State, that money paid under a mistake of fact may be recovered back, however negligent the party paying may have been in making the mistake, unless the payment has caused such a change in the position of the other party that it would be unjust to require him to refund.

To this rule, however, there are some exceptions, established by decisions which have been so long acted upon that it is not proper to disturb them. One is, where the drawee of a draft or bill of exchange pays it to a *bona fide* holder, under the belief that the signature of the drawer is genuine, and it turns out to have been forged. It has been decided that the drawee is bound to know the signature of the drawer, and that if he accepts or pays he cannot

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recall his act. *Price v. Neal*, 3 Burr. 1355; *National Park Bank of N. Y. v. Ninth National Bank of N. Y.*, 46 N. Y. 77. So also it has been held that if one pays a draft, purporting to be accepted by him, he cannot afterward set up that the acceptance was a forgery, as against a *bona fide* holder to whom the payment was made. That he was bound to know his own signature. *Mather v. Lord Maidstone*, 18 C. B. 273. And further, that if a bank pays what purports to be its own bills or receives them on deposit, and passes them to the credit of its customer, it cannot recall the payment, or revoke the credit on subsequently discovering that the bills had been fraudulently altered by raising their amounts. *United States Bank v. Bank of Georgia*, 10 Wheat. 333.

The learned counsel for the appellant seeks to deduce from these cases a general principle that every party is bound to know his own obligations, and that, after having recognized and paid what purports to be his own obligation, he will not be permitted to allege a mistake in reference to its genuineness.

Language is used in some of the cases which appears to sustain this view; but this language must be construed with reference to the circumstances of the case in which it was used. It must also be borne in mind that the cases referred to are rather exceptions to a general rule than adjudications establishing a legal principle; and care must be taken when applying them, to see that, in the case to which they are sought to be applied, all the conditions upon which the exception depends exist. *Goddard v. The Merchants' Bank*, 4 N. Y. 149.

In all the cases referred to as falling within the exception, the alleged mistake consisted in the recognition as genuine of a forged signature, either of the party paying, or of his correspondent, whose signature he was held bound to know; and, in the case of the bank bills, in the recognition as genuine of bills issued by the bank itself, the body of which, as well as the signatures, were the work of the bank. In the case of the bank bills, considerations of public policy, connected with the character of the bills as currency, entered largely into the reasoning of the court, and are much relied upon by STORY, J., in the elaborate opinion which he delivered. But giving to the decision, for present purposes, its largest scope, it goes no farther than to hold that, in case of an alteration in the body of an instrument, the recognition of the altered instrument as genuine is binding upon the party who made the body as well as the signatures.

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And the distinguishing feature of all the cases is that the forgery ought to have been detected by a bare inspection of the instrument itself, without the necessity of reference to books or any thing outside of the document presented, even the memory of the party as to the written obligations which he has issued.

In the present case it is contended that, when the check for \$56 was certified by the Bank of Commerce, such certification made it an obligation of that bank; that, when subsequently presented to the bank in its altered condition as a check for \$15,006, the bank was bound to know its own obligation, and to detect the forgery, and that the bank, by recognizing it as genuine and acquiescing in the payment through the clearing-house, precluded itself from afterward setting up its own mistake.

On general principles, mere negligence in making the mistake is not, as has been already shown, sufficient to preclude the party making it from demanding its correction. Such negligence does not give to the party receiving the payment the right to retain what was not his due, unless he has been misled and prejudiced by the mistake. If his loss had been incurred and become complete before the payment, he should not, in justice, be permitted to avail himself of the mistake of the other party to shift the loss upon the latter. To render it compulsory upon the courts to refuse a correction of the mistake, the facts of the case must bring it within the excepted ones before referred to. This the facts of the present case fail to do. The essential element is wanting, that the body of the instrument as well as the certification was the work of the bank, and that, therefore, it was conclusively presumed to know, by a mere inspection of the instrument, whether or not it had been altered. The bank was not bound to know the handwriting or genuineness of the filling up of the check. It was legally concluded only as to the signature of the drawer and its own certification. The rules of law in relation to the correction of mistakes of fact have been gradually growing more liberal, and are moulded so as to do equity between the parties. The exceptions which have been established by authority, and have been engrafted upon the commercial law, it is not our purpose to disturb; but they should not be extended; unless a case is clearly brought within them the general principles should govern. No case has been cited, nor do I think any can be found, which holds that a payment by mistake, such as is shown in the present case, cannot be recovered back.



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If the defendant had shown that it had suffered loss in consequence of the mistake committed by the plaintiff, as for instance if, in consequence of the recognition by the plaintiff of the check in question, the defendant had paid out money to its fraudulent depositor, then, clearly, to the extent of the loss thus sustained, the plaintiff should be responsible. But it appears that all the money which Greenleaf, the fraudulent depositor, obtained from the Mechanics' Banking Association, on the credit of the altered check, was paid out on the 16th of February, the day before the check was presented to the plaintiff. On the 16th, Greenleaf drew out of the Mechanics' Banking Association a larger amount of money than that for which it had given him credit on the faith of the altered check, and he drew none afterward. The recognition of this check by the plaintiff, on the 17th of February, could not have had any influence upon the action of the Mechanics' Banking Association in paying Greenleaf's drafts on the 16th. The loss occasioned by those payments had been fully incurred by the Mechanics' Banking Association before the plaintiff had made the mistake which it seeks in this action to have corrected. Such being the case there is no equity in the claim of the Mechanics' Banking Association to retain the money which it obtained from the plaintiff through mistake, and thus to shift the loss which it had sustained, through the fraud of its own customer, from itself to the plaintiff.

Neither do we find any thing in the conduct of the plaintiff, after the payment of the check, which should preclude it from reclaiming the money which it has paid. Delay in discovering and giving notice of the mistake is complained of; but the evidence shows that notice was given immediately on the discovery of the mistake, and it fails to show that, by the failure to receive earlier notice, any damage was sustained by the defendant. All the judges of the court below are agreed upon this branch of the case, notwithstanding their division upon the principal question.

The judgment should be affirmed.

All concur.

*Judgment affirmed.*

NOTE.—See *National Park Bank v. Ninth National Bank*, 7 Am. Rep. 310, and note. Since the decision of the principal case, the same court has decided, in *Marine National Bank v. National City Bank*, 10 Alb. L. J. 360 (not yet reported in the regular series), that a bank is not liable upon its certification of a check drawn upon it to a bona fide purchaser for value, where the check has been fraudulently "raised" before certification. The court, in the course of its opinion, said:

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"When a check is presented to a bank on which it is drawn for certification, the purpose is to ascertain with certainty, what the bank alone can know, and that is, whether the drawers of the check have funds sufficient to meet it; and, further, to obtain the engagement of the bank that these funds shall not be withdrawn from the bank by the drawers of the check. To this extent the knowledge of the bank must, of necessity, enable it safely to go in the way of assertion; and its own power over its own funds will suffice to protect it as to its obligation. But if the doctrine contended for in opposition to this view is correct, and the certifying bank is bound to warrant, not only the genuineness of the drawers' signature and the sufficiency of their credit, but also the genuineness of the check in all its parts, including the specification of the amount to be paid and the names and identity of the payees, then obviously there must occur an immediate and complete change in the modes of doing business which would defeat and practically put an end to the use of certified checks. For no bank, under such a rule, could safely certify to a check without, in the first instance, investigating its origin and history by inquiry of the makers and payees. The burden of such inquiries could not be borne without interrupting the other necessary business of the banks, and the practice of certifying checks would have to be abandoned, or a staff of inquirers instituted in every bank specially charged with these duties. It is plain that banks, in self-protection, would be compelled to refuse altogether to certify checks, and that this convenient and useful invention of modern business would come to an end. The mischief would arise from charging the banks with a knowledge that, in the nature of things, they cannot possess. With their responsibility limited to the facts within their knowledge, the practice imposes no burden upon banks, and subserves the convenience of commerce. No construction ought to be put on acts, in the usual course of business, which will impose upon the parties interested the necessity of immediately altering it. For, as the question is necessarily what did the parties mean, we cannot, without violent construction, attribute to them a meaning so burdensome that it will necessitate a change of the usual way of doing business. Such a meaning we know they cannot have entertained. We have been referred to various expressions in different cases, stating, in quite positive and general terms, the obligation of banks upon certified checks: *Farmers' Bank v. Butchers' Bank*, 16 N. Y. 125; *First National Bank v. Leach*, 52 id. 350; *Cooke v. State National Bank*, id. 115. These are to be construed with reference to the facts disclosed in the cases. In such cases the question has been, in various forms, whether the bank certifying a check could defend itself upon the ground of want of authority in the certifying officer, or that the drawer had no funds. These being facts within the knowledge of the certifying bank, it was necessarily precluded from disputing its certificate. But there is no ground of reason or authority for extending the rule to matters not being especially within the knowledge of the certifying bank, such as those which form the ground in this case on which the bank's claim of immunity rests."—*RES.*

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**McMaster v. The Insurance Company of North America.**

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**McMASTER V. THE INSURANCE COMPANY OF NORTH AMERICA,**  
appellants.

(55 N. Y. 222.)

*Fire Insurance — undisclosed prior insurance — effect of statement in proofs of loss. Parol evidence.*

Proofs of loss do not form a part of the contract of insurance; and the assured is not estopped from showing that a statement in the proofs of loss was a mistake so far as it states facts going to annul the policy.

A policy of fire insurance contained a proviso that it should be void in case the assured had a prior insurance upon the property of which the company was not notified, and to which it did not consent. The property having been destroyed, the proofs of loss were sent in, containing a statement that there was other insurance on the property at the date of the policy. *Held*, that the assured was not estopped from showing that the statement was a mistake, and that there was no other insurance on the same property.

In a contention between a party to an instrument and a stranger to it, either may give parol evidence differing from the contents of the instrument.

ACTION by David McMaster against the President and Directors of the Insurance Company of North America upon two policies of fire insurance issued by defendant to one S. B. Lake, one of which was made payable to plaintiff, and the other to Maria B. Clark, and by her assigned to plaintiff. The first policy insured Lake "on his barouche in shop north side of Rock street, near the railroad building occupied as a paint and trimming shop, Saratoga Springs, N. Y. This barouche is painted black, with red stripes; on storage." The second policy insured a barouche, carriage, single harness, double harness, three cutters, one sleigh, one lumber wagon, one two-horse lumber wagon and two buggies, cloth, leather and trimmings "all on store in the lower part of the paint shop on the north side of Rock street, near the railroad, in the village of Saratoga."

The policies each contained a proviso that "if the assured shall have or hereafter make any other insurance on the property herein insured, or any part thereof, without notice to, and consent of, the company, in writing \* \* \* this policy shall be null and void." Each policy also required all persons having claims under it to give immediate notice stating "other insurance, if any, and a copy of all policies."

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Previous to the issue of the policies, Lake had procured a policy from the North American Fire Insurance Company of Hartford "on his buggies, chariotees, lumber wagon or other vehicles, finished or unfinished, and stock and materials for making and finishing, contained in the frame building occupied by him as a wagon-maker's shop, situated on the north side of Rock street, between Front street and railroad track, in the village of Saratoga Springs, Saratoga county, N. Y., \$500 other insurance. Loss, if any, payable to Elijah S. Parker to extent of his mortgage interest."

The property covered by the policies in suit was destroyed by fire, and the proofs of loss verified by Lake stated that there was other insurance on the same property, setting forth the policy of the North American Fire Insurance Company of Hartford.

At the trial plaintiff was allowed, under objection, to prove by Lake that the statement in regard to the other policy in the proofs of loss was not true. The trial being without a jury the court found that the other policy was not upon the same property; and judgment was directed for plaintiff. The general term affirmed the judgment and defendant appealed to this court.

*Esek Cowen*, for appellants. Plaintiff was estopped, by the statement in the proofs of loss, from showing that the Hartford policy was not upon the same property as the policies in suit. *Pres. Ch. of Salem v. Williams*, 9 Wend. 147; *Irving v. Excelsior Ins. Co.*, 1 Bosw. 507; *Sheppard v. Hamilton*, 29 Barb. 156. The evidence of the assured must yield to the plain meaning of the written policies. *Hooper v. H. R. Ins. Co.*, 15 Barb. 413.

*A. Pond*, for respondent. There was no evidence of a double insurance sufficient to constitute a violation of the policies, or to estop plaintiff. *Clinton v. Hope Ins. Co.*, 45 N. Y. 454, 464. Defendants' agent had notice of the prior insurance, and is estopped from setting up a breach of the conditions of the policies as to double insurance. *Rowley v. Empire Ins. Co.*, 3 Keyes, 557. The statement in the proofs of loss does not estop plaintiff. *Tyler v. Aetna Ins. Co.*, 12 Wend. 507; 16 id. 385; *Rowley v. Empire Ins. Co.*, *supra*. The statement is not broad enough to warrant an estoppel. *Coke on Litt.*, 352, *b*; *Lansing v. Montgomery*, 2 Johns. 382. There was no estoppel contained in the statement in the proofs of loss, because the truth appeared by the same statement.

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Coke on Litt., 352, *b*; *Sinclair v. Jackson*, 8 Cow. 544; *Warren v. Leland*, 2 Barb. 613; *Goodyear v. Ogden*, 4 Hill, 104; *Clark v. Ins. Co.*, 9 Gray, 148. The proofs of loss were not put in evidence to show what property the North American policy covered, and cannot be used by the defendants on that issue. 6 Rob. 316, 320, 321; 4 Den. 502, 508; 30 Mo. 166; 9 Barb. 191, 200; 1 Greenl. Ev., §§ 96, 96, *a*; *Platt v. Picton*, 3 Rob. 64; *Jenner v. Joliffe*, 6 Johns. 9; *Weland Canal Co. v. Hathaway*, 8 Wend. 480; *Waterville Manuf. Co. v. Bryan*, 14 Barb. 184; *Hasbrouck v. Baker*, 10 Johns. 248; *Hatch v. Pryor*, 3 Keyes, 343; *Bryant v. Woodruff*, 5 N. Y. Leg. Obs. 139. Plaintiff cannot be estopped unless defendants were misled by the statement into a defense. 49 N. Y. 111; 18 id. 392; *Wilcox v. Howell*, 44 id. 398; *Brown v. Bowen*, 30 id. 541; 6 Seld. 402; 51 Barb. 208; 52 id. 447, 449; 33 id. 177.

FOLGER, J. There are two principal grounds on which the defendants rely to defeat the action of the plaintiff:

First. That Lake, the assignor of the plaintiff, and the assured named in the policy, broke the conditions of that instrument, by having other prior insurance on the property therein insured, or on some part thereof, without notice to and consent of the company in writing, as required by the conditions of their contract.

Second. That the insured having (as is claimed) stated in the proofs of loss submitted to the defendants that he had other insurance on the same property, the plaintiff is estopped from showing the contrary thereof, though the contrary be true; and that the declaration thus made is conclusive evidence of the fact asserted by the defendants.

1. The learned justice who tried the action has found, as a conclusion of fact, that the assured kept and performed the conditions of the policy to be kept and performed by him, and that the defendants have failed to establish the defense stated and averred in their answer. This is tantamount to a finding of fact, that the assured did not have other prior insurance on the property insured by the policies from the defendants. To this finding the defendants excepted. The first inquiry then is, is that finding contrary to all of the evidence in the case? It is shown by the stipulation, which was read in evidence, that the assured, before the issuing of the policies in suit, did procure a policy from a company at Hartford. The proofs of loss, verified by his oath, and

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delivered to the defendants, aver that there was other insurance on the same property, and specify the last-named policy as the one by which it was made. There are certain phrases in the description of the matter insured, contained in the Hartford policy, which may apply to the property covered by the policies issued by the defendants. On the other hand, there are certain phrases in the policies in suit which are not contained in the description in the Hartford policy.

Again, the assured, as a witness in this case, testifies that the policy from the Hartford company does not cover the same property as do the policies in suit; and that it was by an unintentional mistake that it was stated in the proofs of loss that there was other insurance on the same property; and that his understanding of the statement in the proofs of loss was that it declared that the other insurance was on property in general, covering a lot of other property, and not covering this property. There was also a policy of insurance from another company in New England. It is not shown that it was procured by the assured in the policies in suit. The proofs of loss state, as to this one also, that it was on the same property. The assured testified as to this policy also, that it does not cover the same property, and testified, as before stated in regard to it, as to his intentions and his mistake. The description in this policy differs from that of all the others, and is not so specific as to point unmistakably to the same property. There is a conflict of testimony here. The two statements of the assured, each under his oath, are at variance. There is not entire accord in the descriptions in the several policies. It was for the trial court, having the witness before it, beholding his demeanor, to judge of the strength of his testimony and the weight to be given to it, and to decide whether his statement as a witness overcame his statement in the proofs of loss, and also, in light of all the facts disclosed, to pass upon the differences in the description of the property contained in the several policies. Here was a case for the trial court to exercise its province of finding what was the fact. There is not so clear a contradiction between the finding made and the evidence returned, as will warrant this court in holding as matter of law that there was error therein. Here the learned and acute counsel for the defendants insists that the documentary evidence showed, beyond a doubt, that the Hartford policy did in fact cover the same property as that mentioned in the

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policies issued by the defendants; and that, although Lake, the assured, denied this, his evidence must yield to the plain meaning of the written policies. Without conceding or denying that their meaning is so plain, we say that this view was one to be presented to the trial court and not to this. It can be yielded to here only by reversing the finding on a question of fact arrived at through a consideration of conflicting evidence. This we may not do. The result is, that the defendants did not make out the affirmative defense set up in their answer.

2. The second ground taken by the defendants arises on the objection taken to the admission of testimony. If we catch aright the exact point sought to be made in the objection taken, at the trial, to the testimony offered by the plaintiff in contradiction of the statement of the preliminary proofs, it is this. One branch of that objection is that they, being part of a contract, cannot be reformed, save by an action to that end. This is not renewed upon the brief submitted in this court, and indeed is not tenable. The proofs of loss are not part of the contract of insurance, nor a part of any contract. The contract of insurance requires that they shall be rendered, but it does not make them, when rendered, a part of itself, as sometimes an application for insurance is made. They are the act or declaration of one of the parties to a pre-existing contract, in attempted compliance with its conditions. The other party to the contract is not a party to this act or declaration, takes no part in making it, does not assert that it is a true statement, and is not bound thereby. The instrument which makes the proofs of loss may be amended by the insured at his will, subject always to the necessity that it be furnished to the insurer in such reasonable time as to meet the requirements of the conditions of the policy.

The other branch of the objection is, that the assured, having made his verified proofs of loss with this statement in it, had led them into a particular defense, and is estopped to deny it. The fact that there is a verification does not of itself conclude the assured. It has been repeatedly held to the contrary. *Smith v. Ferris*, 1 Daly, 18-20, and cases there cited. If by this objection is meant that the plaintiff is estopped to show the existence of a contract of insurance, and the circumstances which have created a liability to him on the part of the defendants, and that this rests upon the established doctrine of an *estoppel in pais*, we cannot ac

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hold. The proofs of loss do not create the liability to pay the loss. They do no more in this aspect than to set running the time at the end of which the amount contracted for shall become payable, and at which action may be brought to enforce the liability. All the elements of an *estoppel in pais* are lacking. It arises from an act or declaration of a person, intended or calculated to mislead another, on which that other has relied, and has so acted or refrained from action, as that injury will befall him if the truth of the act or declaration be denied. Now the declaration of the assured in the proofs of loss was not intended nor calculated to mislead the defendants into any change of their situation, by which they assumed a liability to him, or assented to the existence of one. Its natural effect, if it is to be interpreted as the defendants claim that it should be, is to prevent an assent to the existence of a liability; and it had no effect, if thus interpreted, to create one. Nor did the defendants rely upon this declaration, and thereupon change their situation so as to contract or incur a liability. Before it was made they had done that from which their liability took its rise. Nor does the exhibition of the truth, though at enmity with the declaration, create or increase or change the liability. The case differs from two of those cited by the defendants (*The Trustees, etc., v. Williams*, 9 Wend. 147, and *Sheppard v. Hamilton*, 29 Barb. 156), for in each of those the plaintiff, having an option of two courses of action in which to enforce a claim against the defendant, was led by the declaration of the latter, calculated to mislead, to take one which he could not afterward forsake without injury, but which he must be defeated in and forsake, if the defendant was permitted to falsify his declaration. And the fact stated there, in the declaration of the defendant, was the sole fact material in affecting the action of the plaintiff. Those cases do not go upon the ground that the declaration of the defendant led the plaintiff to sue; but on this, that he having a valid claim which might be sued in one form or another, or upon one instrument or another, dependent upon the existence of a certain fact; the statement of the defendant averring the existence of that fact, led to the adoption by the plaintiff of one of those courses, to abandon which or be driven from it afterward would have been of injury to the plaintiff; therefore the defendant was held to be estopped from denying the truth of that statement. If, notwithstanding the statement of the existence of that fact, the plaintiff had still been obliged to inquire



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for the existence of other facts, and to rely upon them also to sustain the course of action adopted, those decisions would have been different. The plaintiff's situation there was changed after the declaration, and by reason of it. Here the defendants' situation, as to its liability, is not changed thereby. It does not appear that, relying upon the defense supposed to be furnished by the statement in the proofs of loss, any other tenable defense had the go-by.

It is suggested, that the plaintiff claimed on the trial that the other insurance was not on the same property, by reason of the words "on storage" in these policies, and that these words meant that the subject insured was the property of some one other than the insured, and that, if this had been revealed by the proofs of loss, another defense would have been opened to the defendants; that then they would have insisted that the assured had no insurable interest, or that he had avoided the policy by omitting to state that his interest was not absolute. We do not understand that the plaintiff claimed on trial that the words mentioned meant that the property was not his. Indeed the witness, Lake, did not quote or refer to these words. The learned justice who tried the cause does, indeed, refer to them in his opinion, but only to enforce his position that the defendants, having the burden of proof upon them, did not give to the court all the light which they should have done, if they would bring the court to see the case as they did. It is not perceived that this phrase was of such vitality in the case as that the plaintiff's right of action hinged upon it, or that the true interpretation of it depended upon any fact which would have afforded to the defendants another tenable defense.

The decision in *N. Y. Central Ins. Co. v. Watson*, 23 Mich. 486, does not conflict with these views; while that of *Commerce Ins. Co. v. Huckberger*, 52 Ill. 464, and of *Hoffman v. Aetna F. Ins. Co.*, 1 Robt. 501 (affirmed 32 N. Y. 405-415), aid it.

*Irving v. Excelsior F. Ins. Co.*, 1 Bosw. 507, is also cited by defendants. With respect for the considerate views of the learned judge who delivered the opinion in that case, we are bound to say that the utterance relied upon is *obiter*. Though it is said there that the plaintiff was concluded by the statement in his proofs of loss, and could not be heard to controvert it, yet the testimony which was objected to on that ground, and was received at the trial notwithstanding objection, is considered on review, is given weight to as harmonizing with and confirming the statement, and judg-

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ment is given for the plaintiff, the statement being held to be substantially true. It is plain that the view taken of this point did not conduce to the judgment, and was not necessary to the judgment arrived at. So far as the *dictum* in that case is put upon the rendition of the proofs of loss being a condition precedent to a recovery, we shall allude to it further on. The case of *Campbell v. Charter Oak Ins. Co.*, 10 Allen, 213, went mainly upon that ground. Says DEWEY, J., delivering the opinion of the court: "A true statement was called for by the conditions of the policy. It was a condition precedent to the liability to be called upon to pay the loss. If this be rejected as being a false statement, then no statement has been filed, and for that reason the plaintiff cannot recover. If allowed to stand as part of the statement, the policy has been avoided. It is difficult to perceive how the dilemma can be avoided while this statement remains as the only one filed with the company." There are some observations of the learned judge which look toward a recognition of the applicability of the doctrine of an *estoppel in pais*, to the facts of the case. But there is nothing putting it squarely on that ground; and if there was, we should be compelled to differ for the reasons above stated. And, indeed, we may say that it seems to be with hesitation that the learned judge comes to the result, on any ground, that the assured was concluded by the statements in his proofs of loss. There is nothing in the case in hand which compels us to express an opinion upon the soundness of the view contained in the passage which we have quoted from the opinion in the case last cited, and which is, to some extent, put forth in 1 Bosworth, *supra*. The conditions of the policies in the case here require that the assured shall render a particular account of his claim, with an affidavit stating the time and circumstances of the fire, the other insurance, if any, and a copy of all policies, etc.; and it is declared that until such proofs are rendered the loss shall not become payable. The current of the decisions runs to this: That courts will not be astute to find ways to work the forfeiture of a contract of insurance; rather they will strive to uphold it, and will construe conditions and provisions in a policy strictly against an underwriter, and will incline to uphold the agreement. The terms of the condition will not be enlarged by construction to include what is not within its letter. With this in view, what is the claim of the defendants? This: That the conditions of the policy are, that "if the *assured* shall have any other insurance on the property therein insured, or

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any part thereof, without notice to and consent of the defendants in writing, the policy shall be null and void;" that the proofs of loss do state that "there was other insurance on the same property," and give copies of the written parts of the policies; that this shows that the assured has violated the condition against *his* having other insurance; that thus the proofs of loss do declare to the defendants that the policies issued by them to him are "null and void;" and that, relying upon that, they may make that defense and need make no other, for the plaintiff is concluded from denying the existence of the facts which he has thus averred. This chain has one imperfect link. The assured does not declare, in his proofs of loss, that *he* had other insurance on the property. He declares only that there was other insurance upon it, which he is required to do by the terms of the clause in the policy which provides for the rendition of proofs of loss. The two things — other insurance had by the assured, and other insurance on the property — are not the same. *Aetna F. Ins. Co. v. Tyler*, 16 Wend. 385; *Rowley v. Empire Ins. Co.*, 3 Keyes, 557. He has not then stated in his proofs of loss that which shows that he has made null and void his policies, and has not thus furnished to the defendants a defense upon which they may rely. Hence the plaintiff is not estopped by the statement of that as a fact. He has declared to them only that there was other insurance, it may be of him or of some other man. They still are without the material for a perfect defense, and remain so until they learn and are able to show that such other insurance was insurance had by the assured. Though they did at the trial show this fact, by the stipulation read, as to one of the policies of the other insurance, that was proof *aliunde* the proofs of loss. The plaintiff had a right to combat it, and, in view of the trial court, he combated it successfully, by proving to its satisfaction that it was not on the same property.

It is contended that no inference can possibly be made, from the statements in the proofs of loss, save that the assured in these policies did have the other insurance. The defendants thus ask, in effect that, setting up a technical defense, they shall be sustained in it, in the absence of express showing, by an inference; and thus there be wrought a forfeiture of a contract, which the law looks upon with disfavor, solely upon the ground of an *estoppel in pais*, which the law equally disrelishes. For the law loves that the truth come to light; but an estoppel hides it. It is permitted to do so

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only that a fraud shall not be wrought. We are not inclined to go the length that is demanded, in such a case as this.

There was one other objection made at the trial, which is referred to in the points in this court, and should be noticed. To the witness Lake was put the question: "The buggy, chariotees, lumber wagon, and other vehicles — was that the same property as mentioned in either of the policies sued upon?"

It was objected that it was incompetent for the witness to state whether it was or not — the description should control. We understand this objection to raise the point that Lake, being a party to the contract of insurance containing this description, could not contradict it by parol. The rule, that parol testimony may not be given to contradict a written contract, is applied only in suits between the parties to the instrument or their privies. The parties to a written instrument have made it the authentic memorial of their agreement, and for them it speaks the whole truth upon the subject-matter. It does not apply to third persons, who are not precluded from proving the truth, however contradictory to the written statements of others. Strangers to the instrument, not having come into this agreement, are not bound by it, and may show that it does not disclose the very truth of the matter. And as, in a contention between a party to an instrument and a stranger to it, the stranger may give testimony by parol differing from the contents of the instrument, so the party to it is not to be at a disadvantage with his opponent, and he, too, in such case, may give the same kind of testimony. *Badger v. Jones*, 12 Pick. 371; *Reynolds v. Magness*, 3 Ired. 26.

The judgment appealed from should be affirmed.

All concur.

*Judgment affirmed.*

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Bryce v. Lorillard Fire Insurance Company.

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BRYCE, appellant, v. LORILLARD FIRE INSURANCE COMPANY.

(55 N. Y. 240)

*Fire insurance — reformation of contract — location of property insured — warranty.*

A mistake, in order to authorize a court of equity to reform a contract of insurance, must be one made by both parties, or it must be a mistake of one party in connection with the fraud of the other, in taking advantage of the mistake.

Defendant insured merchandise described in the application and policy as "contained in letter C, Patterson stores." These stores constituted a warehouse divided into sections by fire-proof walls, and were designated by letters of alphabet. The merchandise was in fact in "letter A," at the date of the policy and of its destruction by fire. *Held*, that defendant was not liable in the policy, the description being a warranty of the particular location of the merchandise.

ACTION by Charles S. Bryce, assignee of John Lavens, against the Lorillard Fire Insurance Company, to obtain a reformation of a policy of fire insurance issued by defendant to Lavens, and to recover for a loss by fire. The application and the policy described the property insured as merchandise "contained in letter C, Patterson stores, south front, below Pine street, Philadelphia." The "Patterson stores" was a warehouse in Philadelphia, divided into eight sections by fire-proof walls, and there was no communication between them, they were designated by letters of the alphabet. At the trial defendant was allowed to prove, under objection, that in making a survey for the purpose of insurance each section was considered as a separate building. At the date of the policy, and also of the fire, the merchandise was actually in "letter A" of the Patterson stores.

Judgment for defendant was affirmed at general term, and plaintiff appealed to this court.

A. C. Fransioli, for appellant. If the words of the written contract failed, by mistake, to express the real intention of the parties, the court has power to reform the policy or discard the wrongful words. 1 Story's Eq. Jur., § 155; *Welles v. Yates*, 44 N. Y. 525, 529, 530; *Cole v. Brown*, 10 Paige, 534. No warranty can be derived from the words "letter C." 2 Pars. on Cont.

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(5th ed.) 492, and note *c*; *West. Ins. Co. v. Cropper*, 32 Penn. St. (8 Casly) 351, 355; *Franklin Fire Ins. Co. v. Updegraff*, 43 id. (7 Wright) 350; 2 Pars. on Cont. (5th ed.) 506, note *m*; id. 555; 1 Greenl. Ev., §§ 277, 278, 280. Plaintiff is entitled to recover, invoking simply the application of the maxim, "*falsa demonstratio non nocet*," to the facts. *Burr v. Broadway Ins. Co.*, 16 N. Y. 267; *Strong v. N. A. F. Ins. Co.*, opinion Gen. Term, 6th dist.; *Yonkers & N. Y. F. Ins. Co. v. Hoffman F. Ins. Co.*, 6 Robt. 316; *Tyler v. N. A. F. Ins. Co.*, 4 id. 151; *Solmes v. Rutgers' F. Ins. Co.*, 3 Keyes, 416.

*Carlisle Norwood, Jr.*, for respondent. In order to reform a written contract, it must be shown that the written instrument does not express the real contract. *Pennell v. Wilson*, 2 Abb. Pr. (N. S.) 466; *Boardman v. Davidson*, 7 id. 439, 441. As the goods insured were not contained in letter C, the warranty being broken the plaintiff cannot recover. Ang. on F. and L. Ins., §§ 140, 754; Flanders on F. Ins. 204; *De Halm v. Hartley*, 1 T. R. 385; *Jennings v. Chenango Co. M. Ins. Co.*, 2 Denio, 75; *Chase v. Hamilton Ins. Co.*, 20 N. Y. 57; *Kennedy v. St. L. M. Ins. Co.*, 10 Barb. 289; *Wall v. E. R. M. Ins. Co.*, 7 N. Y. 370; *Lappin v. Charter Oak F. and M. Ins. Co.*, 58 Barb. 348; *Shoemaker v. G. F. Ins. Co.*, 60 id. 101; *Pierce v. Empire Ins. Co.*, 62 id. 636; *Delonguemans v. Tradesmen's Ins. Co.*, 2 Hall, 589; *Ripley v. Aetna Ins. Co.*, 30 N. Y. 157; *First Nat. Bank of Ballston Spa v. Prest., etc., Ins. Co. of N. A.*, 50 id. 45.

FOLGER, J. The several exceptions to findings of fact, and to refusals to make findings of fact as requested, are not well taken. To make a legal error in a finding of fact, which this court may review, there must be no evidence in the case upon which the finding may be based. To make such error in a refusal to find, the evidence must be clearly conclusive in favor of the finding proposed. There was, in this case, evidence on which each of the finding can be based, and there is evidence which will sustain each of the refusals to find. The learned justice who tried the cause has seen fit to rely upon that evidence, and we may not review his action in that respect.

The claim of the plaintiff, that the contract of insurance was erroneous through mistake, and should have been reformed, is not

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tenable. The mistake which will not warrant a court of equity to reform a contract in writing, must be one made by both parties to the agreement, so that the intentions of neither are expressed in it; or it must be the mistake of one party, by which his intentions have failed of correct expression, and there must be fraud in the other party in taking advantage of that mistake, and obtaining a contract with the knowledge that the one dealing with him, is in error in regard to what are its terms. The findings show that the defendant made just the contract which it, from the first, intended to make, and just the one which it understood the plaintiff's assignor meant to make. Whatever may have been the intention of the insured or his agent, there is nothing in the findings, nor in the evidence, which shows or has a tendency to show, that defendant or its agent purposed any thing else than to insure property in section C of the Patterson stores. Such being the case, it is not in the power of the court to reform the instrument, for thereby violence will be done to the intentions of the defendant. Nor is there found fraud in the defendant or its agent. Nor is there evidence which would warrant such finding.

The case cited by the plaintiff, of *Welles v. Yates*, 44 N. Y. 525, is not analogous to this. That was the case of a mistake in the attempt by the vendor to perform, by the execution of a conveyance, a pre-existing contract for the sale of land. The assignee of the vendee, knowing that the conveyance did not contain an exception stipulated for in the contract, and that the vendor was in error in omitting it, still accepted the deed and refused to correct the mistake, intending to reap the profit of it. The conveyance was there reformed, on the ground of the fraud of the assignee of the contract, and on the ground that it was an erroneous performance of a contract, as to the terms of which there was no dispute. These two conditions cannot be predicated of the contract in the case in hand. Nor is this case like unto *Coles v. Browns*, 10 Paige, 334. There the chancellor refused to enforce a contract for the purchase of land resting in parol, on the ground that the vendee did not understand and intend it as the vendors did. The vendors were seeking to enforce a contract, as they claimed it to be, against one who denied the making of that contract, and averred that he made another and a different one. Specific performance was refused, because the doubt was so great whether both parties understood alike, the agreement to be implied from the defendant's bid. To

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allow this contract of insurance to be reformed and then enforced, would be to do just what the court there refused to do; for here as there, the defendant did not understand the terms of it, as they are claimed by the plaintiff to have been, and to impose it upon them in those terms, would be to make a contract for them which they did not intend to enter into. The policy of insurance is, then, to be taken as the contract of the parties. It was, then, a contract to insure property "contained in letter C, Patterson stores, South Front, below Pine street, Philadelphia." And that description of the place of deposit of the property, written into the policy in accordance with the application of the insured, was a warranty by him of its particular location, and the truth of that warranty became a condition precedent to any liability to him from the defendant. And it was a warranty and a condition precedent, not to be avoided by the fact that the truth of the description was not essential to the risk, nor an inducement to the defendant to enter into the contract. This rule is so well established in the law of insurance, as that it must be adhered to, although it may work hardship in a particular case. Nor does it depend upon its freedom from a susceptibility to a double interpretation, that a description is a warranty. Whatever is expressed, whether with perspicuity or obscurity, that is what is warranted. Other rules then come in to assist in the discovery of what the language means. If there be latent ambiguity, that may be removed by testimony. And here there is latent ambiguity. The language used is the language of the parties. It does assert, and therefore warrant, that the property is "contained in letter C, Patterson stores," etc. The phrase "letter C," taken by itself, has a meaning. But by reason of collateral matter and extrinsic circumstances an ambiguity arises. It had an especial or technical meaning to those engaged in the business of putting property on storage in the Penn warehouse, and to those who solicited and who wrote insurance upon it. When the testimony gives that meaning, it indicates but one thing; that part of the Patterson stores, which is designated to owners of property and to insurers of it, as the section or division C thereof. It is impossible to say, in the light of all the circumstances disclosed by the pleadings and the testimony, that letter C of the Patterson stores is not section C thereof, and that a description of property, as that "*contained in letter C, Patterson stores,*" does not mean property deposited in that division of that warehouse known and



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designated as letter O. It is impossible to say, that it does mean property mentioned in a book *O* of the proprietors of that building, as plaintiff contends.

The doctrine maintained in *The Western Insurance Co. v. Cropper*, 32 Penn. St. 351, and *Franklin Fire Insurance Co. v. Updegraff*, 43 id. 350, will not aid the plaintiff. Those cases hold that, if the clauses of a policy be obscure, it is the fault of the insurer, for he it is who has penned the language; so that if it be capable of two interpretations, that must be adopted which is most favorable to the insured. There is not room here for but one interpretation. "Letter O, Patterson stores," has but one meaning. The latent ambiguity prevents that being seen on the bare reading of the phrase. When that ambiguity is done away with by the testimony, there is no difficulty in interpreting the words and reaching their sense.

The plaintiff invokes the aid of the maxim, "*falsa demonstratio non nocet*." It may be conceded that there is a false description of the location of the property. But that is not enough to bring into operation the rule embodied in that maxim. There must be in the description so much that is true, as that, casting out that which is false, there is still enough left to clearly point out the place in which is the property. Indeed, an authoritative definition states and qualifies the rule more narrowly than this, viz.: "As soon as there is an adequate and sufficient definition, with convenient certainty of what is intended to pass by the particular instrument, a *subsequent* erroneous addition will not vitiate it." Broom's *Leg. Max.* 464, \* 605. But it need not so to restrict in the case in hand. The phrase "letter O," as meaning the place of storage of this property, is a false showing. If that phrase is rejected, then the whole description is contained in the words, "Patterson stores, South Front, below Pine street, Philadelphia." These words do, as far as they go in meaning, tell the truth as to the situation of the property. They do not, though, tell the whole truth, nor the whole essential truth. The word "Philadelphia," alone, would tell the truth, but not the whole of it. To be made certain as to the exact place of deposit of the property, for the purpose of this contract, it needed not only to know in what city it was, and on what street therein, but in what building on that street. And if that building was so constructed as to be of many divisions, practically separate each from the other for safety from fire, and treated as distinct in making contracts of insurance, certainty of description

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needed some expression of what division it was in. This was the office of the phrase "letter C." If that phrase be rejected, and no other truthful phrase be inserted, the description fails to show just where in the Patterson stores the property was placed. That phrase, though false, might harm, for it pointed the description to the wrong place, and some equivalent for it was needed to complete a truthful description.

The evidence taken against the objection of the plaintiff was competent. It was to show that this part of the description, though wrong, was harmful, and therefore not to be rejected. It was to show, that though there was a warehouse known as the Patterson stores, it was one made up of several divisions, as distinct, for the purposes of storage of property and of the insurance of it against fire, as the dwelling-houses in a block; and that to know the place of the property, needed the naming of the section of the building in which it was, as much as if the risk had been on household goods. Their situation would not have been pointed out short of the expression in the description of the number of the house in the block.

We are of the opinion that the defendant established a strictly legal defense to the action of the plaintiff. As we sit here to declare the law, and not to propound a code of morals, we must sustain it.

The judgment appealed from must be affirmed, with costs to the respondent.

All concur.

*Judgment affirmed.*

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**HUGHES V. THE MERCANTILE MUTUAL INSURANCE COMPANY,**  
appellant.

(55 N. Y. 285.)

*Marine insurance — mistake in policy as to vessel.*

A mistake in the name of a vessel in a policy of marine insurance is no obstacle to a recovery, if in point of fact both parties had in view the same vessel, and the underwriter, when the policy was issued, knew the true name, or intended to insure the particular vessel lost; but when there is a mistake as to the vessel sought to be insured, and the policy is upon another vessel than that for which application was made, no contract exists, as the minds of the parties did not meet; and this is so, although the underwriter was put upon inquiry, and by the exercise of diligence and care could have prevented the mistake; negligence alone will not avoid the difficulty.

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**APPEAL** from judgment of the general term of the Court of Common Pleas for the city and county of New York, affirming a judgment in favor of plaintiff, entered on a verdict, and affirming an order denying a motion for a new trial.

This action was brought upon a policy of marine insurance. The vessel insured was described in the policy as follows: "The good bark called the *Empress*, or by whatever other name or names the said vessel is or shall be named or called." The complaint alleged that the bark intended to be insured was called the *St. Mary*, and that the defendant, in making out the policy, by mistake named her the *Empress*.

The facts appear sufficiently in the opinion.

*Townsend Scudder*, for appellant. Parol evidence is not admissible to vary the policy. 1 Greenl. Ev., § 275; *Lamalt v. H. R. F. Ins. Co.*, 17 N. Y. 199, note; *Brown v. Catt. Ins. Co.*, 18 id. 389; *Sarsfield v. Met. Ins. Co.*, 61 Barb. 482; *The Delaware*, 14 Wall. 579, and cases cited; *N. Y. Ins. Co. v. Thomas*, 3 Johns. Cas. 4; *Phoenix Ins. Co. v. Gurnee*, 1 Paige, 278. It is only when the policy is on its face ambiguous that the previous agreement is permitted to control the interpretation. 1 Duer on Ins. 71, 73; 1 Pars. on Marine Ins. 108; *Birmingham v. Empire Ins. Co.*, 42 Barb. 457; *Jennings v. Chenango Co. M. Ins. Co.*, 2 Den. 75. The fact that plaintiff did not read the application does not raise a presumption that it did not truly express the contract. *Hallenbeck v. De Witt*, 2 Johns. 404. Plaintiff was bound to prove the identity of the vessel insured and the vessel lost. *Ionides v. Pacific F. & M. Ins. Co.*, L. R., 6 Q. B. 674; Transcript Nov. 29, 1871.

*Robert P. Lee*, for respondent. The name of the vessel was not material if it could be identified in any other way. Emerigon, chap. 6, § 11 (Meredith's ed.), 127; 1 Phil. on Ins., § 430; 1 Duer on Ins. 172, 173; *Hall v. Mollineaux*, 6 East, 382, 386; *Le Mesurier v. Vaughan*, id. 382; *Clapham v. Cologan*, 3 Camp. 382. Defendant is estopped from avoiding its contract on account of errors into which it led plaintiff. Flanders on F. Ins. 100, and cases cited; *Plumb v. Catt. Ins. Co.*, 18 N. Y. 392; *Rowley v. Em. Ins. Co.*, 36 id. 550; *Wilkinson v. Ins. Co.*, 13 Wall. 222, 232, 233 *Benedict v. Ocean Ins. Co.*, 31 id. 393.

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ANDREWS, J. It was incumbent upon the plaintiff, before he could recover for the loss of the bark "St. Mary," to show that the contract of insurance related to that vessel.

The policy of insurance was upon the bark "Empress, or by whatever other name or names the bark is or shall be named or called." The bark lost was the "St. Mary," but the mistake in the name was no obstacle to a recovery, if in point of fact the underwriter, when the policy was issued, knew the true name, or intended to insure the particular vessel which was lost. 1 Arnould on Ins. 30, 170; 1 Duer on Ins. 172; *Sea Ins. Co. v. Fowler*, 21 Wend. 600; Pothier on Sales, art. 3, § 2; *Le Mesurier v. Vaughan*, 6 East, 382.

When it appeared upon the trial, in connection with the proof of loss, that the name of the vessel was the "St. Mary," it was necessary for the plaintiff to establish, by further evidence, the identity of that vessel with the bark "Empress," named in the policy. This he attempted to do by proof that he acted in procuring the insurance as agent for McGinness, the owner of the "St. Mary," and that she was formerly known as the "Empress," her name having been changed in October, 1865, before the issuing of the policy. The plaintiff also testified that, at the time of the application for the insurance, he informed Mr. Newcomb, the vice-president of defendant's company, of these facts, and that the bark when last heard from, on the twelfth of December, was at Nevassa Island, loading with guano.

There can be no doubt that the plaintiff intended to procure an insurance on the "St. Mary," and that he supposed that the policy when issued related to that vessel. Nor could there be any doubt, if no additional proof had been given, that the underwriter intended that the policy should attach to the "St. Mary," and that there was no *aggregatio mentium* between the parties to the contract.

But it also appeared, before the plaintiff rested, that there was a written application for insurance made by the plaintiff, and signed by him and his insurance broker at the interview between the plaintiff and Mr. Newcomb. In this application it was stated that the plaintiff desired insurance to the amount of \$5,000 on the bark "Empress," of 365 tons burden, built at Sunderland in 1858, rated A 1½. It appeared upon the examination of Thompson, the plaintiff's broker, that applications for marine insurance are ordinarily filled out by the merchant or broker seeking insurance; that in

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this case, after the oral application was made and Mr. Newcomb had consented to take the risk, he asked the plaintiff if he should fill out the application for him, and he replied "yes;" that Newcomb then sent a clerk to the office of Taylor & Co., ship surveyors, which was in the same building with that of the defendant, and who were publishers of the Lloyd's Register, for information as to the "St. Mary." The clerk brought a printed book, which the evidence clearly establishes was the Register, issued in June, 1865, and pointed out the entry of a survey of the bark "Empress," which he stated was that of the "St. Mary," the name having been changed after the book was published. Newcomb then filled out the application, and the plaintiff signed it without reading it, and the policy was subsequently issued upon this application. The Register contained a description of two barks named "Empress," both built at Sunderland; one described as built in 1852, of 426 tons, and rated  $\Delta$  2, and the other as built in 1858, of 365 tons, and rated  $\Delta$  1 $\frac{1}{4}$ . The first of these vessels was the "St. Mary;" the other did not belong to McGinness, and he had no interest in her, and is the one described in the application.

When the plaintiff rested, the counsel for the defendant moved to dismiss the complaint, on the ground that it appeared that the defendant did not insure and did not intend to insure the "St. Mary."

It is a clear proposition that an agreement can only be formed by the consent of the parties, and there can be no consent when the parties are in error respecting the object of their agreement. Pothier on Obligations, vol. 1, art. 3, § 17; 2 Bl. 442; 2 Kent, 477; 1 Pars. on Cont. 475; *Hazard v. New England Ins. Co.*, 1 Sum. 218; *Hammond v. Allen*, 2 id. 387; *Bruce v. Pearson*, 3 Johns. 534; *Greene v. Bateman*, 2 W. & M. 359. The mistake in such a case would relate to the very ground and essence of the transaction.

Considering the policy issued by the defendant in connection with the application, and the description of the vessel called the "Empress," in the book referred to when the application was drawn, there seems to be no doubt that the vessel which the defendant intended to insure was the "Empress" described in the application, and not the vessel of that name owned by McGinness.

There is no claim that the agent of the defendant, knowing the bark the plaintiff had in mind, fraudulently inserted the descrip-

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tion applicable to the other. The underwriter would, in such a case, be estopped from alleging the misrepresentation in the application as a defense, or from setting up that there was no mutual assent to the contract made. Nor would the jury have been authorized to find that the agent having in mind the "St. Mary," and its true description, by mistake, in transcribing from the register, inserted in the application the description of the other vessel. The plaintiff informed the defendant's agent, when the application was made, that the vessel upon which he desired insurance had been owned by Pearson & Co., of Hull, and the fact that she had been so owned appeared in the printed description of the "Empress" contained in the register. It was also shown, that in October previous, the vessel had been resurveyed and reclassified by a surveyor of Lloyds, and that the record of the survey was in the office of Taylor & Co. at the time of the application for insurance, and that the defendant's agent was informed that a new survey had been made. It did not appear that in fact the defendant had any knowledge of this survey or any information as to either of the vessels called the "Empress" beyond what was communicated by the plaintiff at the time of this application, or was contained in the printed description. The most that can be claimed from this proof is, that the defendant's agent was put upon inquiry, and might, by the exercise of diligence and care, have avoided the mistake in respect to the vessel sought to be insured. But the negligence of the agent does not avoid the difficulty, that, in fact, the minds of the parties never met upon the subject of the insurance. The plaintiff applied for insurance on one vessel, and the defendant agreed to insure another. If both parties had in view the same vessel, and the error in the application related to some quality of the vessel, or to some extrinsic fact, and the error was that of the agent of the insurer, authorized to fill out the application, and the falsity of the representation was relied upon as a defense, another question would be presented which has been considered in several cases in this court. *Plumb v. Cattaraugus Ins. Co.*, 18 N. Y. 392; *Rowley v. Empire Ins. Co.*, 36 id. 550.

The filling out of the application in this case by the agent of the underwriter was not according to the usual practice. The plaintiff signed it without reading it, and his omission to do so prevented him from discovering the mistake.

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We are of opinion that the motion to dismiss the complaint should have been granted, upon the ground that no contract of insurance was effected between the parties.

The judgment of the general term should be reversed, and a new trial granted, with costs to abide the event.

All concur.

*Judgment reversed.*

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MULLER v. PONDIR, appellant.

(55 N. Y. 325.)

*Negotiable paper — stoppage in transitu — bona fide holder.*

A vendor of negotiable paper has the right of stoppage in transitu, not only against the vendee, but also against a creditor of the vendee who has made a loan upon the promise of the vendee to transfer the paper to him on its arrival. One who possesses only an equitable title to negotiable paper is not a *bona fide* holder.

Plaintiff, of Havana, on the order of S. & Co. of New York, drew bills on a London firm, and sold them for currency bills in New York, payable to R. S., a clerk of S. & Co. The bills were delivered to a vessel to be transported to New York, and deposited in the post-office. Plaintiff also telegraphed to S. & Co. what he had done, and S. & Co. procured a loan from P. on the faith of the telegram, and with the understanding that when the bills should arrive they would transfer them to P. as security. On the following day S. & Co. became insolvent, and plaintiff, having learned of this, commenced an action, through his agent in New York, to recover the bills on their arrival, and obtained an order enjoining S. & Co. from transferring or disposing of them. *Held*, that plaintiff had the right of stoppage in transitu, and that P. was not a *bona fide* holder of the bills, they never having been indorsed to him or come into his possession.

ACTION by George H. Muller against John Pondir and others to recover possession of certain bills of exchange. On May 12, 1869, Schepeler & Co., of New York, sent an order to plaintiff, of Havana, directing him to draw bills of exchange for £20,000 on J. Henry Schroeder & Co., of London, and to sell the bills in Havana for currency bills on New York, and send the same to Schepeler & Co. Among the bills drawn in obedience to this order were certain bills amounting to £9,000, with which currency bills were purchased made payable to the order of Richard Smith, a clerk of

Schepeler & Co. These bills were inclosed in an envelope addressed to Schepeler & Co., and given to the purser of the steamer Cleopatra, to be transported to New York and delivered to the postmaster. On May 13, 1869, plaintiff sent the following telegram to Schepeler Co. :

“HAVANA, May thirteenth (13), 1869.

“SCHEPELER & Co. :

“Drew nine (9), twelve (12), and eleven three-quarters (11 $\frac{3}{4}$ ) ; remit Cleopatra sixty thousand (60,000), twenty-six half (26 $\frac{1}{2}$ ).

“MULLER.”

The meaning of this telegram, as understood by all parties, was that plaintiff had drawn £9,000 as ordered, had sold a portion at 112 and a portion at 111 $\frac{3}{4}$ , and would remit by the steamer Cleopatra \$60,000 in bills on New York purchased at 26 $\frac{1}{2}$  per cent discount. On the 14th of May, 1869, Schepeler & Co. exhibited the telegram to defendant Pondir, and asked for a loan of \$70,000. Pondir agreed to make the loan, provided they would promise to transfer the bills to him when they arrived as security ; and they accordingly transferred the telegram to Pondir with a letter signed by Schepeler & Co. expressing that promise. The loan was then made. On May 15, 1869, Schepeler & Co. failed. The agent of plaintiff in New York learned of this before the arrival of the Cleopatra, and commenced an action to recover the bills. An injunction was obtained enjoining Schepeler & Co. and Smith from transferring or disposing of the bills on their arrival.

The court held that plaintiff did not have the right of stoppage *in transitu* and awarded the bills to defendant Pondir. The judgment was reversed at general term and a new trial granted, whereupon Pondir appealed to this court.

*W. W. MacFarland*, for appellant. Plaintiff had no right to stop the currency *in transitu*, and, if he ever had any, it was destroyed by the assignment of it to defendant Pondir. *Gilson v. Caruthers*, 8 M. & W. 340 ; 1 Smith's Lead. Cas., 432 *a* ; Smith's Merc. Law, 552 ; *Wiseman v. Vanderpot*, 2 Vern. 203 ; *Luce v. Prescott*, 1 Atk. 246 ; *D'Aquila v. Lambert*, 2 Eden, 75 ; *Feise v. Wray*, 3 East, 93 ; *Newson v. Fountain*, 6 id. 17 ; *Sifkin v. Wray*, id. 371 ; Bell's Com. on Laws of Scotland (7th ed.), 223, 224, 245. Wherever the right of stoppage *in transitu* exists, it may be



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defeated by a sale of the goods *in transitu*. It is not necessary to a valid sale of the goods that they should be in the actual possession of the vendor. 2 Kent (marg. page), 578; *Wilson v. Little*, 2 N. Y. 443; *Dykens v. Allen*, 7 Hill, 448; *Houser v. Kemp*, 3 Barr. 208; Story on Bail, § 290; *Davies' D. C. R.* 199; 1 Hare, 549; *McComber v. Parker*, 13 Pick. 175; *Calkins v. Lockwood*, 16 Conn. 276. Plaintiff is estopped from asserting a claim to these bills against Pondir. *Const. Nat. Bank v. Nat. Bank of Commonwealth*, 50 N. Y. 575; *Young v. Grate*, 13 E. C. L. 253; *Leckbaum v. Mason*, L. T. R. 70; *Fatman v. Loback*, 1 Duer, 354; *Bank of Buffalo v. Kortright*, 22 Wend. 348; *Putman v. Sullivan*, 4 Mass. 45; *McDonald v. Muscatine Bank*, 37 Iowa, . Pondir was entitled to have the bills indorsed; and the indorsement would have relation to the day of his purchase. Story's Eq. Jur., § 64; *Smith v. Pickering*, Peak's Cases, 50; *Anonymous*, 1 Camp. 492; *Rollston v. Herbert*, 3 T. R. 411; *Ex parte Gruning*, 13 Ves. 206; *Ex parte Rhodes*, 3 M. & D. 217; *Watkins v. Marsh*, 2 J. & W.; *Pilans v. Van Microps*, 2 Ben. 1663; *Clarke v. Locke*, 4 Ea. 57; *Barney v. Worthington*, 37 N. Y. 112. If neither party had a legal title to the bills, equity would give it to the one who had the strongest equity. *Willoughby v. Willoughby*, 1 T. R. 763; *Blake v. Hungerford*, Pr. in Ch. 158; *Charlton v. Low*, 3 P. Wms. 328; *Ex parte Knott*, 11 Ves. 609; *Shine v. Gough*, 1 Ball & B. 436; *Bowen v. Evans*, 1 J. & L. 264. The equitable assignee of a chose in action is not liable to the latent equities of third persons of which he was ignorant when he took the assignment. *Livingston v. Dean*, 2 Johns. Ch. 479; *Murray v. Lylburn*, id. 443; *Murray v. Ballow*, 1 id. 366; *Davis v. Barr*, 9 S. & R. 137; *Taylor v. Sett*, 10 Barr. 431; *Mott v. Clark*, 9 id. 403; *McConnell v. Warwick*, 4 Har. 365; *Moore v. Holcomb*, 3 Leigh, 597; *McBlair v. Gibbs*, 17 How. (U. S.) 232; *Ohio Life Ins. Co. v. Ross*, 2 Md. Ch. 225; *Judson v. Corcoran*, 17 How. (U. S.) 615.

*E. W. Stoughton*, for respondent. Pondir was not a *bona fide* holder of the bills. *Hedges v. Seaty*, 9 Barb. 215. He took the assignment of the bills, subject to all the equities of the original parties. *Bush v. Lathrop*, 22 N. Y. 535. Plaintiff was the vendor of the bills, and was entitled to stop the bills *in transitu* the same as if they had been merchandise. *Smith v. Bowles*, 2 Esp. 578; *Houston's Law of Stoppage in Transitu*, 28; 1 Pars. Ship. & Adm.

Law, 481, note 1; 1 Grif. & Hol. on Bankruptcy, 371-375; *Feiss v. Wray*, 3 East, 93; *Siffken v. Wray*, 6 id. 371; *Haws v. Pratt*, 17 N. Y. 263. A vendor's right of stoppage *in transitu* can only be defeated by a transfer of the bill of lading to one who, *bona fide* and without notice that the goods have not been paid for, advances money on the faith thereof. *Newson v. Thornton*, 6 East, 41, *Holbrook v. Voss*, 6 Bosw. 107-111; *Stanton v. Eager*, 16 Pick. 473; *Gardner v. Howland*, 2 id. 599; *Craven v. Ryder*, 6 Taunt. 433; *Small v. Moates*, 9 Bing. 574; *Dixon v. Yates*, 5 B. & A. 313; *Jenkyns v. Osborne*, 7 M. & G. 679, 699; *Akerman v. Humphrey*, 1 Carr. & P. 53. Pondir had only such title to the bills as Schepeler & Co. had, which was subject to the right of plaintiff to stop *in transitu*. *Bush v. Lathrop*, 22 N. Y. 538; *Davis v. Austin*, 1 Ves. 247; *Sprights v. Hawley*, 39 N. Y. 446; *Lickborrow v. Mason*, 1 S. L. C., 2 W. & T. Eq. Cas. 75; *Covell v. Tradesmen's Bank*, 1 Paige, 131; *Mangles v. Dixon*, 3 H. of L. Cas. 712, 714, 718, 731. To defeat plaintiff's right to stop *in transitu* the bills should have been actually indorsed and delivered to Pondir. *Roger v. Comptoir*, 2 Priv. Coun. Ap. 39; *Hedges v. Sealy*, 9 Barb. 215.

ALLEN, J. Pondir, who claims title to the bills in controversy, under Schepeler & Co., alone defends this action. As between him and Schepeler & Co., it may be conceded that by the loan of money to the latter firm, under the circumstances established at the trial, and upon their promise to transfer the bills when they should arrive in New York, he acquired an equitable title, and could have enforced a specific performance of the promise, and an indorsement and delivery of the bills to him.

But this equitable right comes far short of conferring upon him the rights of a *bona fide* holder for value of negotiable paper when transferred in the usual method and in the ordinary course of business. A transferee of commercial paper for value, in the ordinary course of business, without notice of any defects in the title, is protected by the law-merchant against all latent equities, whether of third persons or of parties to the instrument. His title is perfect, and his right to enforce the obligation absolute. But if any of the circumstances are wanting which go to make up this perfect title, a purchaser or transferee of commercial paper takes it subject to the same rules which control in the case of a transfer or assignment of non-negotiable instruments.

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The defendant Pondir never became the holder of the bills in dispute; they were not transferred to him by indorsement in the usual way or in any other manner, and were not at any time in his possession, either actual or constructive; they were never within his control or in the possession or within the control of Schepeler & Co., from and under whom he claims title. He only acquired such rights and equities as existed in Schepeler & Co., subject to all equities as against them. He occupies precisely the position of that firm; and whatever rights or remedies the plaintiffs or others had against them, in respect to the bills, can be asserted against Pondir as their equitable assignee. *Gilbert v. Sharp*, 2 Lans. 412; *Hedges v. Sealy*, 9 Barb. 214; Story on Prom. Notes, § 120, note 1; *id.*, § 120, *a*; *Savage v. King*, 17 Me. 301; *Calder v. Billington*, 15 *id.* 398; *Southard v. Porter*, 43 N. H. 379.

Neither was there any thing in the history of the transaction or the acts of the parties which will give Pondir a better or other title as against the plaintiff than the mere equitable title, valid as against Schepeler & Co. only. The plaintiff is not estopped from asserting the same equities and the same legal rights against Pondir which would have availed against Schepeler & Co. The only act of the plaintiff upon which stress is laid and upon which an estoppel is sought to be based, is his dispatch to Schepeler & Co.; elliptical and obscure in its terms, but which was understood by the parties to whom it was addressed, and which indicated that the sender had drawn and sold bills on London to the amount of £9,000, at the prices stated, and against the bills so drawn would remit, by the steamer *Cleopatra*, \$60,000 in bills on New York, which had been purchased at the discount stated. The telegram was true in all its parts; and the plaintiff does not seek now to convert the truth of any of the statements there made. There was nothing in it to indicate the relation of the plaintiff or his correspondents, Schepeler & Co., to the bills, or the title of either to them. There was no statement inconsistent with the absolute ownership, by the plaintiff, of the bills to arrive by the *Cleopatra*, or with any claim the plaintiff might make to or in respect of them as against Schepeler & Co., or any other person. The title of the bills was not the subject of or referred to in the dispatch; and if Pondir acted at all on the faith of Schepeler & Co.'s ownership or right to dispose of the bills, it was upon their statement of such ownership and right, and not upon any statement of the plaintiff; and the case shows, as the

court has found, that Pondir did part with his money solely on the credit of Schepeler & Co., on the faith of their representations and promise to hand the bills over on their arrival. The only practical use of the telegram was to identify in a manner the bills which Schepeler & Co. claimed to own, and promised to transfer. The court below has found that the loan was made by Pondir in good faith; he relying upon the telegram of the plaintiff and the security of the bills in question. He could only rely on the telegram so far as it assumed to state facts; and the only security by means of or upon the bills he acquired was by the written promise of Schepeler & Co. to transfer them; and their representations *de hors* their dispatch.

But an insuperable difficulty in predicating an estoppel *in pais* against the plaintiff upon the dispatch is, that it was designed solely for the information of the persons to whom it was addressed, and not to influence the action of any other person; and the communication was not of a character calculated to or which could, in the usual course of business, influence the action of third persons; and least of all was it calculated to induce any one to part with money upon the credit of the bills referred to, and faith in the title of Schepeler & Co. to them. The plaintiff could not have foreseen that the dispatch would be used as the basis of a credit, or that money could be borrowed on the faith of it. Every element of an estoppel was wanting. A party is only concluded, that is, estopped from alleging the truth by a declaration or representation, inconsistent with the facts asserted and attempted to be proved, when it is made with the intent, or is calculated, or may be reasonably expected to influence the conduct of another in a manner in which he will be prejudiced if the party making the statement is allowed to retract, and when it has influenced and induced action from which injury and loss will accrue, if a retraction is allowed. *Finnegan v. Carraher*, 47 N. Y. 493; *Dezzel v. Odell*, 3 Hill, 215; *Copeland v. Copeland*, 28 Me. 525; *Brown v. Bowen*, 30 N. Y. 519; *Frost v. Saratoga Mutual Ins. Co.*, 5 Den. 154, and cases cited by BRONSON, J.; *Brown v. Wheeler*, 17 Conn. 345; *Continental Nat. Bank v. Nat. Bank of Commonwealth*, 50 N. Y. 575. There is no statement in the cable dispatch which is inconsistent with the rights now asserted by the plaintiff; and the assertion of such rights is not against good conscience in any view of the dispatch or the use

designed or expected to be made of it, or which was actually made of it. The plaintiff is not, therefore, estopped from asserting any right he may have to the bills in controversy.

Neither does the rule invoked by Pondir, that when one of two innocent persons must suffer from the wrongful or fraudulent acts of another, the loss should devolve upon him by whose act or omission the wrong-doer has been enabled to perpetrate the fraud, avail him. That applies only when the wrong-doer is invested, by the party sought to be charged, with the ordinary *indicia* of ownership, and *jus disponendi* of property, or an apparent authority to do the act from which loss must accrue to one of two innocent parties. *Commercial Bank of Buffalo v. Kortright*, 22 Wend. 348; *Young v. Grote*, 4 Bing. 253. The evidence of ownership of negotiable bills is their possession, properly indorsed, so as to pass the title to the holder. There is no such thing as a symbolical delivery of negotiable instruments; and the law does not recognize, for commercial purposes, a right of possession as distinct from the actual possession. Had Schepeler & Co. had actual possession, themselves, of the bills, and then indorsed and transferred them to Pondir, the plaintiff would have been remediless. This is not only the legal evidence of ownership, but it is that required in dealing in commercial paper in the ordinary course of business; and he who acts with less evidence of title in one claiming to have the right of disposal, does so at his peril. As owners, Schepeler & Co. had no apparent title upon which the plaintiff could or did rely.

Neither can an authority be spelled out or inferred from the dispatch to Schepeler & Co. to deal with the bills, either as their own or as the agents of the plaintiff or other owner. The apparent authority which will charge the plaintiff rather than the defendant with loss, under the rule invoked against him, must be found in the terms of the dispatch and not in the declarations and representations of Schepeler & Co. The court has found that the dispatch gave to Schepeler & Co., and it could give no other or different idea to any other person, the information that he had drawn on London, and sold the bills, "and against the bills so drawn would remit, by the steamer *Cleopatra*, \$60,000 on bills drawn on New York." For what purpose or for whose use the bills on New York were to be remitted, was not stated and cannot be implied, except that they were remitted against the London bills. The

meaning and purpose of the dispatch, beyond the meager and barren advice of a proposed remittance for some purpose, must be gathered from the course of business of the parties, or from facts not stated in or to be implied from its terms. But, as remarked in considering the question of estoppel, the communication was legitimate, and in the ordinary course of business not calculated to mislead any one as to the relation of the parties to each other or the bills in controversy; and certainly no person, familiar with commercial usage and the law relating to bills of exchange, could anticipate that such a dispatch could avail to enable any one to negotiate the bills as owner, or otherwise, before their arrival, or that money would be advanced upon any supposed title or agency of the receiver of the dispatch to, or in respect to, the bills.

The only remaining inquiry is, as to the right of the plaintiff as against Schepeler & Co., as Pondir occupies precisely their position, and has succeeded to their rights. The doctrine of stoppage *in transitu* was largely discussed at the bar in the argument of the case.

It has no direct application; and as the transaction is in its nature entirely distinguishable from the sale of goods upon credit to one who becomes insolvent before they come to his actual possession, or other persons have acquired rights as purchasers for the value, and the rules which control in respect to the evidence of title and the mode of transmitting or transferring the title of negotiable instruments, and merchandise or other personal chattels are so entirely dissimilar, that but little advance will be made in arriving at a correct result in this case by reviewing the reported decisions referred to by counsel, elucidating the right and declaring its limits and the cases in which it may be exercised. This is not a case of stoppage *in transitu*. But the principle which lies at the foundation of the right of stoppage *in transitu* is very directly involved in this action, and upon it the rights of the plaintiff to the bills in controversy, in a great measure, depend. The right of a vendor to follow and reclaim merchandise sold upon credit, upon the happening of the insolvency of the purchaser, is an equitable right and is favored in the law. *Harris v. Pratt*, 17 N. Y. 249; *Smith v. Bowles*, 2 Esp. 578. It had its origin in a court of equity, but has become thoroughly engrafted upon the common law, and is now well established as a legal right; and the same reasons which give to a seller of goods to a distant purchaser, who

becomes insolvent, the right to stop them if he can do so before they come into the possession of the purchaser, will give to the plaintiff here the right to retain the bills in suit. Difficulties exist in the way of the seller of merchandise pursuing and retaking his goods, after sale, by which the title had passed to the buyer, which do not exist in respect to these bills; and this right to stop goods *in transitu* may be lost under circumstances which would not and could not, in the nature of things, apply to dealings in or in respect to commercial paper.

The equities upon which the right of stoppage *in transitu* rests are stated in *Wiseman v. Vandeputti*, 2 Vern. 203. The plaintiffs, as assignees in bankruptcy of Bonnells, merchants in London, brought their bill for a discovery and relief touching certain silks consigned to the Bonnells by an Italian firm; but before the ship sailed from Leghorn, news came that the Bonnells had failed, and thereupon the Italians altered the consignment, and consigned the silks to the defendants. The court ordered a trial at law in an action of trover, to determine whether by the first consignment the property of the silks vested in the Bonnells, and upon the trial the plaintiffs had a verdict. Upon the cause coming on to be heard upon the equity reserved, the court declared that the plaintiffs ought not to have had so much as a discovery, much less any relief, in regard that the silks were the proper goods of the Italians and not of the Bonnells, nor the produce of their effects; and, therefore, they having paid no money for the goods, if the Italians could, by any means, get their goods again into their hands, or prevent their coming into the hands of the bankrupts, it was but lawful for them so to do, and very allowable in equity. The precise equity of the Italians and their English consignees, the defendants in that case, grew out of and rested upon the fact that, in the course of commercial dealings, the Italians had given credit to the Bonnells, relying upon their solvency and their ability to meet their obligations, and that firm having failed, the consideration which induced the Italians to engage in the transaction and part with their goods had failed, and unless they could repudiate the consignment, and retake their goods, they would be the losers, and that equity did not require that the transaction should be consummated, and the goods of the Italians go to swell the assets of the bankrupts, or go to some favored creditor, and they left to come in as creditors under the statute of bankrupts.

The fact that the credit and the danger of loss arose from a sale of merchandise, rather than any other commercial dealings, had no peculiar force, and added no charm to the equity. All that is necessary to bring a case within the precise principle, and the reasons assigned in that case, and which have never been repudiated, but have come to be favored both at law and in equity, is that faith and credit shall have been given to the solvency of another who has failed, while yet the fruits of that credit are in the actual or constructive possession, or within the reach of the party giving the credit, and who will be the loser unless he can retain or reclaim such fruits; and the particular relation of the parties to each other, or the nature of the transaction in which credit is given, is not material, neither is the right confined to goods or personal chattels, or a sale of goods on credit. There is no distinction between personal chattels *in transitu*, or merchandise or money, or negotiable bills, which affects the rights of parties. *Smith v. Bowles*, 2 Esp. 578.

It may be remarked that fraud is not a necessary ingredient of the equitable right involved in this action, and asserted by the plaintiff. Had the court below found as a fact that Schepeler & Co. fraudulently induced the plaintiff to engage in this transaction, we should have regarded it as abundantly sustained by the evidence. Indeed, it is difficult to see how they could, with honest intent, upon the eve and within three days of an avowed insolvency so complete and absolute that it is doubtful whether their assets will pay ten per cent of their liabilities, induce an innocent foreign correspondent to assume liabilities for them to an amount exceeding \$100,000, under the circumstances and in the form detailed in the case; but it is not necessary to establish actual fraud to enable the plaintiff to assert his right to retain the bills. The plaintiff became the purchaser of the bills in controversy and undertook to remit them to Schepeler & Co. upon the credit of that firm, and relying upon their solvency and ability to provide for their payment in London, and to indemnify him against them. They were not bought with the funds and were not the produce of the effects of Schepeler & Co., or bought upon their credit, except as the plaintiff gave them credit. They were bought with the avails of the credit of the plaintiff, and his credit only. The bills on London, from the sale of which the funds were obtained for the purchase of these bills, were drawn by the plaintiff, who was the only person liable



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upon them. It is true they were drawn by direction of and against the account of Schepeler & Co. with the London bankers, but they were not accepted, and upon the non-acceptance the plaintiff was the only party liable to the holders upon the bills, and against this liability he only had the undertaking, express or implied, of Schepeler & Co. In truth, Schepeler & Co. had no credit with the London bankers, the drawees, but their account was largely overdrawn. Before the bills could be accepted, and probably before they left Havana, news was received of the failure of Schepeler & Co., upon whose credit and solvency the plaintiff had relied in drawing and selling the bills. In brief, the plaintiff had, before receiving intelligence of the insolvency of Schepeler & Co. by the negotiation and sale of bills drawn by himself, and upon which he alone was responsible, obtained the money with which the bills in controversy were purchased. It was in one sense a borrowing of money by the plaintiff upon his credit for the use of Schepeler & Co. If while the money, the proceeds of the sale of the London bills, had been in the actual possession of the plaintiff, he had learned of the insolvency of Schepeler & Co., the latter could not, either in law or equity, have compelled him to pay it over to them or their assignee in bankruptcy, or any favored creditor. He could have retained it to indemnify himself against the liability incurred. An agent may have a lien on the property or funds of his principal for moneys advanced or liabilities incurred in his behalf; and if moneys have been advanced or liabilities incurred upon the faith of the solvency of the principal, and he becomes insolvent while the proceeds and fruit of such advances or liability are in the possession of the agent, or within his reach, and before they have come to the actual possession of the principal, within every principle of equity the agent has a lien upon the same for his protection and indemnity. If necessary to his protection, the plaintiff would have been permitted to repudiate the agency and assume that position which would best protect himself from loss by reason of the insolvency of his principal. An action by Schepeler & Co. for money had and received to their use, and which *ex æquo et bono* belonged to them, would have met with no favor. The case is not changed, or the rights of the parties varied, by a conversion of the money into negotiable paper. The rights and equities of the parties continue so long as the money can be traced and identified, until there has been a change

in the possession and title. Had the plaintiff purchased bills payable or indorsed to Schepeler & Co., and had them upon his desk ready for transmission at the time of the receipt of news of the insolvency of that firm, no action could have been sustained by them for recovery of the bills in their possession without indemnity to the plaintiff.

Whether the proceeds of the London bills were invested in negotiable bills or merchandise cannot affect the rights of the plaintiff. The lien would be as sound and stand upon the same principle in the one case as the other. If the purchase had been of goods instead of bills, a lien would have existed in favor of the plaintiff, which would have given him the rights of a vendor, within the principle decided in *Feise v. Wray*, 3 East, 93. The substance, rather than the form of a transaction, determines the rights and obligations of the parties, and, within the reason of the rule, giving a vendor a lien for the price of goods sold, and a right to stop them *in transitu* to the purchaser on the happening of his insolvency, he, upon whose credit or with whose means the goods are purchased, and by whom they are consigned to the purchaser is the seller of the goods. The lien does not depend upon the character of the property, and is equally valid in respect to negotiable bills in actual possession, or capable of being reached as to chattels. The bills in controversy were at all times, up to the time of the commencement of this action, in the actual or constructive possession of the plaintiffs. The purser of the steamer to whom he delivered the package in which they were inclosed was the agent of the plaintiff. He received the package from the plaintiff with special directions to deposit the same in the post-office in New York city, and those directions were revocable by the plaintiff at any time. He could have recalled the package before the steamer sailed, and could he have overtaken the steamer in mid-passage to New York the same right would have continued, and had he met the purser as he stepped on shore on his arrival in New York he would have been subject to the direction of the plaintiff in respect to the package. The bills were not committed to the post addressed to Schepeler & Co., neither were they intrusted to a common carrier consigned to that firm, but were placed in the possession of a servant and agent of the plaintiff for a special purpose, and were, for all purposes, connected with his lien and right to retain them, as if they had been during all that time

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locked up in his safe in Havana. The fact that the bills were payable, either in the body or by indorsement, to Smith, a clerk of Schepeler & Co., and with intent to transfer the title to them, does not invalidate the lien or affect the equitable rights of the plaintiff. The transfer was incomplete until delivery, and a transaction begun, relying upon the solvency of the parties concerned, need not necessarily be consummated, if insolvency occurs. The fact might embarrass the plaintiff in enforcing the collection of the bills, but cannot destroy or invalidate his equitable lien.

I am of the opinion that the plaintiff had and has the legal and equitable title to the bills as against Schepeler & Co., and Pondir claiming under them, and that the order granting a new trial should be affirmed and judgment absolute for the plaintiff.

All concur.

*Order affirmed, and judgment accordingly.*

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**EXCELSIOR FIRE INSURANCE COMPANY V. ROYAL INSURANCE  
COMPANY OF LIVERPOOL, appellant.**

(55 N. Y. 843.)

*Fire Insurance — double insurance — liability of last insurer — rights of mortgagee. Insurable interest of assignee of mortgage.*

The mortgagee of premises assigned the mortgage to C., whose husband, acting as her agent, procured policies of insurance upon the mortgage interest from plaintiffs' agent. Within a few days plaintiffs instructed their agent to cancel the policies, whereupon the agent applied to defendant for an insurance covering the same risk. Defendant issued a policy to C. and delivered it to plaintiffs' agent for C. The property was soon destroyed by fire, and on the following day C.'s husband paid the premium. C. made out proof of loss and sent them to plaintiffs; she subsequently assigned to plaintiffs the claim against defendant on the policy. *Held*, (1) that plaintiffs could not recover against defendant on the ground of re-insurance; (2) but that they could recover as the assignees of C. who obtained a good title to the policy through the acts of her husband and plaintiffs' agent; (3) that C.'s insurable interest was not simply the amount which she had actually paid the mortgagees under the contract of assignment, but the whole amount secured and unpaid upon the mortgage.

A mortgagee who has insured his mortgage interest at his own expense and for his own indemnity, without any agreement with the mortgagor, need not first exhaust his remedy on his mortgage before he calls upon the insurer to make good damage to the property by fire.

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ACTION by the Excelsior Fire Insurance Company and another against The Royal Insurance Company of Liverpool, upon a policy of fire insurance issued by defendant.

On May 7, 1862, and August 1, 1865, James Connelly mortgaged to David Daws and others, property situated in Rochester, New York, known as the "Boston Mills," by two mortgages of \$10,000 each. On July 23, 1870, Mrs. Connelly, wife of the mortgagor, agreed with the mortgagees for an assignment of the mortgages to her, in consideration of the sum of \$15,000. On December 7, 1870, Mr. Connelly, acting as agent for his wife, procured two policies from William McCarthy, the agent of the Excelsior Company and of the Commonwealth Insurance Company, upon her mortgage interest. Within a few days the agent received instructions to cancel the policies, whereupon he applied to French & Smith, the agents of defendant company, for an insurance on the same risk. On the 20th December, a policy was issued by defendant to Mrs. Connelly and delivered to McCarthy. The property was destroyed by fire December 22, 1870. On the following day Mr. Connelly gave McCarthy a check payable to the order of French & Smith, for the premium on the policy. The check was delivered to French & Smith, who gave a receipt for the premium. At the time of the fire Mrs. Connelly had paid on the contract of assignment of the mortgages, \$7,500. On January 5, 1871, she made out proofs of loss and sent them to the Excelsior and Commonwealth companies, claiming to recover against each. She set forth the policy issued by the Royal Insurance Company, and stated that she was informed it was procured by McCarthy as a substitute for the two policies first issued by plaintiffs. But she declared she had no knowledge of any intention to procure the policy from the defendant at the time it was procured. On April 13, 1871, Mrs. Connelly assigned to plaintiffs the claim upon defendant's policy; and plaintiffs brought suit thereon against defendant. Judgment for plaintiffs was affirmed at general term, and defendant appealed to this court.

*Amasa J. Parker*, for appellant. Plaintiff cannot recover because there was no valid contract between Mrs. Connelly and defendant. *Baptist Ch. v. Brooklyn Co.*, 28 N. Y. 153. McCarthy could not be the agent of the Excelsior and Commonwealth companies, and all that he did was void. *Bentley v. Col. Ins. Co.*,

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17 N. Y. 423; *N. Y. Central v. Protection Ins. Co.*, 14 id. 85-41 Barb. 353; 17 id. 132. Mrs. Connelly having elected to disaffirm the contract, she could not afterward affirm it. *Kinney v. Kiernan*, 49 N. Y. 164; *Rodersmund v. Clark*, 46 id. 354; Bigelow on Estoppel, 578. The measure of damages is the loss of the party insured and not the loss sustained by the mortgagor. *Kernochan v. N. Y. Bowers Ins. Co.*, 17 N. Y. 436; *Smith v. Col. Ins. Co.*, 5 Har. 253; Ang. on Ins. 103, ed. 1854, note; id., § 59; *Ogden v. E. R. Ins. Co.*, 50 N. Y. 388; Flanders on Ins. 360.

*W. F. Cogswell*, for respondent. Plaintiffs are entitled to recover as the assignees of Mrs. Connelly. 1 Pars. on Ins. 49, and cases cited in note 1 and note 7, p. 50; *Thompson v. A. T. L. and S. Ins. Co.*, 46 N. Y. 674; *Tinney v. F. H. Ins. Co.*, 5 Mete. 192. Plaintiffs could recover, although they had not paid the loss incurred. *Home Ins. Co. v. Mut. S. Ins. Co.*, 1 Sandf. 137; *Eagle Ins. Co. v. Lafayette Ins. Co.*, 9 Ind. 443.

FOLGER, J. This case comes up on exceptions to a refusal of motion for a nonsuit of the plaintiffs, made first at the rest of the plaintiff's case, and again at the close of all the proofs.

The defendant, by making this motion, concedes that the court may pass upon the facts; indeed, that there is no dispute as to the facts, and nothing therefore to be submitted to the jury. *Winchell v. Hicks*, 18 N. Y. 558. That they have presented in this court questions not made at circuit cannot alter this rule.

We must, therefore, dispose of the case as we deem the facts to be, from our view of the evidence returned.

The claim of the plaintiffs, that the policy issued by the defendant was one for the re-insurance of the former against the risk taken by them, cannot be maintained. There is nothing in the form of the policy to indicate that it is a contract for re-insurance. It seems, it is true, that a contract for insurance need not differ in form from one for original insurance. *N. Y. Bowers F. Ins. Co. v. N. Y. Fire Ins. Co.*, 17 Wend. 359. In the absence, however, of any distinctive form of policy, the claim that the contract is one of re-insurance must be in some way sustained by the proof, more especially when, as in this case, the policy in terms runs to another than the one who claims the benefit of it as a contract for re-insurance. The testimony in this case falls far short of doing this. It

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is true that the agent of the plaintiff applied to the agents of the defendant for re-insurance of the risk taken by the Commonwealth company. It was testified to, that the application was accepted and a binding receipt given. This is denied in the testimony given for the defendants. But if it be conceded to have been proved, it is also proven that the agreement to reinsure was thrown up by consent of both parties; that the binding receipt was returned; that it was expressly agreed that the policy to be issued by the defendant should not be one of re-insurance; that it should be one of insurance, running directly to the original assured. And so it was issued. The purpose of its procurement by McCarthy was twofold; that, in accordance with the directions of his principals, he might cancel the policies issued by him for them; and that he might retain the patronage of Connelly by procuring this insurance for him. The relief of the plaintiffs from their contract was the object of McCarthy. Yet it was to be effected according to his first purpose; not by a continuance of their contract, and a repose by them upon the contract of the defendants as one of re-insurance, but by a substitution of the latter for the former, and a cancellation of the former when substitution was made. This is plain. The clerk of the plaintiffs' agent wrote to Mrs. Connelly, it is inferable to that effect as soon as a contract of the defendants was made. This does away with the idea of re-insurance. For as soon as the policies of the plaintiffs should be canceled by their agent, they would have nothing at risk, and hence no insurable interest, and if the contract from the defendants was of re-insurance, upon the cancellation of the policies of the plaintiffs it ceased.

It is true, as urged by the plaintiffs, that, in dealing with contracts relating to insurance, the law looks very much to the substance of the matter and the real intent of the parties, and does not adhere with tenacity to the mere form. Yet, that does not lead to a disregard of the form, when it is plain that it expresses the intention of the parties, and is the very shape of the contract made by them. The plaintiff cannot recover upon the transactions disclosed in the testimony, upon the ground of a re-insurance.

There are facts in the case, however, which dispose of the objections of the defendants to the plaintiffs' recovery on the policy as one of the original insurance, assigned to the plaintiff. It is proven that Mrs. Connelly, the assured named, had an insurable interest in the property; that James Connelly, her husband, was

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her agent, acting for her in looking after her interests in the mortgages bought of Dows & Co., and in procuring insurance for her and in paying the premium upon the policy issued by the defendants, and that he paid it, knowing it was going to the defendants for their policy theretofore issued; not only this, but from his power and authority as her agent he had an implied authority to conduct the business according to the ordinary custom of trade, and in the manner in which the matters intrusted to him were usually accomplished. Hence he had an authority to employ McCarthy to procure for him and for her the desired insurance.

It appears that Connelly did not name to McCarthy any company from which he wished insurance, but stated the amount he wished, and that it be put in some good company. The act of McCarthy in obtaining the insurance from the defendants, and the act of Connelly in paying, practically with the money of the principal, for premium on this insurance, with knowledge of the policy upon which it was paid, were the acts of Mrs. Connelly, and bound the defendants to her and she to them, in the contract which they issued to her, from the date at which the proposition for insurance was accepted by the defendants and the binding receipts issued.

Nor is this position open to the objection that McCarthy, being the agent of the plaintiffs, could not act for Connelly and for her. In any negotiation in which he represented an interest in opposition to hers, this would be so. In procuring the insurance from the defendants, he represented only her, and was bound only to guard her interests. There was no conflicting duty upon him. He had no authority, so far as is shown, from the plaintiffs to procure this insurance, and did not act for them therein. These facts are of great importance, indeed of controlling influence.

The defendants lay great stress upon the fact that the policies of the plaintiffs were not in fact canceled, and insist that there was an agreement with the defendants that this should be done. The case does not disclose an agreement with defendants so to do. It was, indeed, mentioned to the agent of the defendants that cancellation had been directed by the plaintiffs. It does not appear that it was part of the agreement for issuing of this policy, nor that it was an inducement to the issuing of it. No word to that effect is in the policy. On the contrary, by express words, other insurance is permitted, without notice, until notice is required.

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A willingness was expressed by the defendants' agent at the time this policy was issued, to take a risk to the amount of \$10,000. Save the danger there might be in over-insurance, the continuance in existence of the policies of the plaintiffs would, in case of fire, have been a benefit to the defendants. And the idea of the general term, that they remained in force, was of benefit to the defendants. It doubtless was the moving purpose of the agent of the plaintiffs, he being directed by them to cancel, to obtain that which would stand in stead with the insured, and thus to relieve his principals and retain to himself her patronage. It does not appear that it influenced the local agents of the defendant, or that they had any purpose to relieve any one, or that their action was at all conditional, save upon the affirmance of it by the general agent at Albany. He was not informed of the policies of the plaintiffs when he approved of the risk taken for the defendant and when he issued an original policy for it to Mrs. Connelly. He could not, therefore, have been at all influenced in his action by any consideration of cancellation of the plaintiffs' policies. It is safe to say that there was no agreement nor condition nor understanding that there should be a cancellation of the plaintiffs' policies before this policy became a binding contract.

It is also argued that Mrs. Connelly could not both disaffirm and affirm this contract after the fire; that she could once only elect which she would do, and that one election, when made, was conclusive upon her. There are difficulties in the way of sustaining this position. Not to mention others, this one is sufficient. We have already stated that Connelly was the agent of his wife in the management of her mortgage interest, and in procuring and paying for insurance to protect it, and that he paid the premium on this policy, issued by the defendants, with knowledge, he being her agent and McCarthy acting under him. Mrs. Connelly did not need to take action to affirm their doings for her. They were within the scope of the power and authority which her husband had as her agent. As soon as they acted, she was bound, and the defendants were bound, and the contract made became hers, whether she knew thereof or not. It was not a case which required ratification by her before there was an ownership in her of the policy. Their act was her act, and she could not avoid its effects upon her rights and interests by inaction.

Nor do we perceive that she has expressly repudiated this con-



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tract, as is claimed by the defendants, even if a declaration of repudiation would absolve the defendants and her from their obligations to each other. The proofs of loss, verified by her and served upon the plaintiffs, are relied upon to make out a repudiation. She does, indeed, state in them that the policy was procured from the defendants by McCarthy, or by his direction or procurement, but without her knowledge, privity or information, or her knowledge of his intention so to do, and that she is informed that it was his intention to substitute the same for other policies issued to her, of which intention she denies knowledge. This is the extent of her declaration as tending toward a repudiation of the contract. She does not say that she did not assent to his action, after it had come to her knowledge, nor does she say that she does not then assent to it; and there was reason for caution in the statements made in the proofs of loss. They were made on the 5th day of January, 1871. The fire took place on the 22d of December, 1870. A day or two after the fire the agents of the defendant claimed to Connelly that his principal was not liable on the mill. It was incumbent upon the assured, while she stated the facts with truth, neither to make any claim which the facts would not sustain nor to give up any which they would. The proofs of loss state the existence of this policy very much as they do that of the policies issued to Dows & Co., without comment, on the bare facts which are set forth. It is not clear that the assured has, in these proofs of loss, put herself determinately upon a right of action against the plaintiffs alone, and disclaimed any right of action against the defendant.

Upon another point made by the defendant we think that, even if an insurance company may not purchase and take assignment of and prosecute a policy of insurance upon the property, where it has no interest and no claim is made against it, there is no reason why it, or a receiver of its effects, may not, in such a case as this, where a claim is presented against it, and it is not, while unadjudicated, entirely clear that liability does not exist, make such an arrangement as has been made, with one who actually holds a policy issued by it. *Quebec Fire Ins. Co. v. St. Louis*, 22 Eng. Law and Eq. 73; *Mason v. Saulsbury*, 3 Doug. 61; *Barry v. Mick. Ins. Co.*, Sandf. Ch. 280.

Again, we are of the opinion that Mrs. Connelly had an interest as mortgagee in the property insured by the defendant to the full amount, at least, of their policy. Though the language of the

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description in the policy is involved, it must be taken to describe her mortgage interest not only in the mill but also in the machinery and fixtures, which, in legal contemplation, were included in the mortgage. *Biglin v. N. Y. Cent. Ins. Co.*, 20 Barb. 635; *House v. House*, 10 Paige, 158; *Snedeker v. Warring*, 12 N. Y. 170. And though the risk was divided upon the building and upon the machinery, etc., the loss upon each was greater than the amount named in this policy. She had, it is true, paid but a portion of the amount she had agreed to give in purchase of the mortgages, but she was entitled to seek indemnity, not only to the extent to which she had paid, but the extent of the interest for which she had bargained and agreed to pay. This was the full amount secured and unpaid upon the mortgages.

The defendants further claim that Mrs. Connelly having been insured upon her mortgage interest, the loss sustained by her thereon, for which a recovery can be had, can be no more than that which the mortgaged property shall fail to secure of her debt; and that, as it was proven that the mortgaged property after the fire was sold for \$11,000, which was more than the amount she had paid on her contract to buy the mortgages, she suffered no loss, and therefore has no claim against the defendants.

We have already stated our opinion that her insurable mortgage interest, and hence the amount which she might lose, was not limited to the amount actually paid by her on that contract, but that it equaled the whole amount secured and unpaid upon the mortgages for which she was bound to pay. As there was due and unpaid upon the mortgages a sum of over \$19,000, even if the premises had been available to her, at the price at which they sold after the fire, there was still a deficiency of more than the amount of the defendants' policy.

To this the defendants say that if the plaintiffs' policies are available to Mrs. Connelly for one purpose, as she claims, they are available to the defendants for another. They then insist that those policies should share in the payment of the loss, if any there is; and then, that if the insured must first exhaust her remedy against the mortgaged premises, the amount for the defendants to pay will be much less than the amount adjudged against them. If the premises of the defendants' argument are sound, they are right that such consequence would follow. Without deciding whether the policies of the plaintiffs are in existence, so as to be available

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to Mrs. Connelly and also to the defendants for the purpose of this argument, we will dispose of the point upon the other branch of it.

And this raises the question whether a mortgagee, who has insured his mortgage interest in buildings and fixtures and machinery at his own expense and for his own indemnity, with no agreement or understanding with the mortgagor, must first exhaust his remedy on his mortgage before he can call upon the insurer to make good any part of the damage by fire to the property. The learned counsel for the defendants cites, for the affirmation of this position, Flanders on Insurance (p. 360) and Angell on Insurance (§ 59). Flanders says of an insurance by a mortgagee: "It is not the specific property which is insured, but its capacity to pay the mortgaged debt." Angell says: "It is but an insurance of his debt; and if his debt is afterward paid or extinguished, the policy from that time ceases to have any operation. And even if the premises are after that destroyed by fire he has no right to recover for the loss, for he has sustained no damage thereby." These texts do not, in terms, sustain the propositions of the defendants; and it is only as a corollary, if at all, that it can be deduced from them. If it is the debt only which is insured, it may be said that until the debt, or some part of it, is lost, there is no loss upon the policy, and that the debt nor any part of it is lost until the mortgage fails to obtain it from an enforcement of his mortgage. Neither of these writers cites any decision which sustains the proposition of the defendants, except perhaps one. There are *dicta* in several cases which will be referred to. The one case is *Smith v. Col. Ins. Co.*, 17 Penn. St. 253. There GIBSON, J., states as a rule: "A mortgagee insures not the ultimate safety of the whole property, but only so much of it as may be enough to satisfy his mortgage. It is not the specific property which is insured, but its capacity to pay the mortgaged debt, and, in effect, the security is insured." He does also, by way of illustrative enforcement of his argument, say that a mortgagee insured cannot recover of the insurer for the loss by fire of a few shingles from a building, when the premises are left amply sufficient to secure him his debt.

But when this case is closely scanned it is this: That an insurance of a mortgaged interest is an indemnity against a loss of that debt by a loss or damage to the property mortgaged; that if the mortgaged property is, after the loss occurs to it, still enough in value to pay the debt, there has been, in effect, no loss; that the

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insurer, having paid the mortgage, is entitled to have the recourse to the mortgaged property, and, therefore (and this is the point made on the argument of the case and the point decided), that any concealment of the facts which affects the value of the property is an injury to the insurer and a material concealment which avoids the contract, inasmuch as, thereby, the insurer is misled as to the value of the property on which he relies for ultimate security and reimbursement. The insuree, having several mortgages upon the same property, insured his interest as mortgagee, disclosing the existence of but one, which was the last. This it was which was held to be a material concealment, and injurious to the insurer for the reason stated. We do not understand the learned judge to maintain that an insured mortgagee may not call upon the insurer to pay the loss upon the property, so long as the property remaining is enough to satisfy the debt. It is true that there are to be found *dicta* of learned and eminent judges which it is claimed go the length of the proposition of the defendants. See *Aetna F. Ins. Co. v. Tyler*, 16 Wend. 385-397, where Chancellor WALWORTH says: "In the present case all the insurable interest which Schaeffer had in the property \* \* \* \* was the amount of his unpaid purchase-money, so far as the land upon which the house stood was insufficient to protect him from his loss, and provided the purchaser was unable to pay the same." See, also, *Carpenter v. Roc. Ins. Co.*, 16 Peters, 495-501, per STORY, J.: It is not in either of these cases declared that the mortgagee can claim no more of the insurer than what the security for his debt fails to yield. And if that should be held to be the rational sequence from what is stated, it is certainly to be said, as is said by SHAW, Ch. J., in *King v. State Mut. F. Ins. Co.*, 7 Oushing, 1-11, 12, that a principle is stated not necessary to the decision of the cases. *Kernochan v. Bowery Ins. Co.*, 17 N. Y. 428, is cited also, in which T. R. STRONG, J., says: "If the insurance was of the debt, there should, to warrant a recovery, be a loss as to the debt, which has not occurred and cannot take place, as the mortgaged property still far exceeds in value the sum unpaid and the debtors are solvent." We do not think that it is a statement of a principle, but an argumentative statement of what would be the result of a supposititious case, did it in fact exist, though neither its existence nor indeed the possibility of its existence, under like circumstances, is admitted. Moreover, it was not necessary to the decision of that

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case, even if it is taken as the statement of a principle. Mr. Parsons, in his book of *Marine Insurance* (vol. 1, p. 229), though inclining to the proposition presented by the defendants here, yet says: "We are not prepared to say that, whenever the insured interest is a lien, the insurer may interpose as a bar to a claim for a loss the remaining sufficiency of the property to pay the debt." And in his work on *Contracts* (6th edition, 2d vol., pp. 339, 340), though he says: "There is both reason and authority for saying that in such case he has no claim on the insurer;" yet he adds: "This may not be regarded as an established rule." There are some authorities which tend to the contrary. It is apparent that if it is the debt only of the mortgagee which is insured, and that he has no claim against the insurer until the mortgaged property is exhausted, that the same rule will apply as to the obligation of the mortgage debtor, and that the remedy against him must also be first exhausted. Yet this proposition does not seem to receive sanction. In *Hancock v. Fish Ins. Co.*, 3 Sumner, 132, the same eminent jurist who pronounced the opinion in 16 Peters (*supra*), said: "It has been suggested that the plaintiff has, in fact, sustained no loss, because, for any thing that appears, he may still recover the debts due to him from the seamen; and if so he has sustained no loss. \* \* \* The question is not, in cases of this sort, whether the party has actually lost his debt, \* \* \* but is, whether he has lost the security for the debt \* \* \*" In *Russell v. Un. Ins. Co.*, 1 Wash. C. C. R. 409; S. C., 4 Dallas' C. C. R. 419, it was contended by the defendants, as it is by the defendant here, that the insurer might still resort elsewhere than to the insured, and that, therefore, there was no loss. The court did not sustain the position, saying that a loss had actually happened, and that, though the lien was not destroyed, yet it was such a loss as that the insured might, by an abandonment, throw it upon the underwriter. And see *Godin v. Lond. Ass. Co.*, 1 Burr. 489. In the absence of direct authority, how is the reason of this matter? Can it be said, in any strict or legal sense, that the defendants have contracted to indemnify Mrs. Connelly for a loss of her mortgaged debt? Whence is their power to guarantee the payment or collection of a debt? Fire underwriters in these days, in this State, are the creatures of statute, and have no rights save such as the State gives to them. They may agree that

they will pay such loss or damage as happens by fire to property. They are limited to this. It was not readily that it was first held that they could agree, with a mortgagor or lienor of property, to reimburse to him the loss caused to him by fire. He is not the owner of it; how, then, can he insure it, was the query. And the effort was not to enlarge the power of the insurer so that it might insure a debt, but to bring the lienor within the scope of that power, so that the property might be insured for his benefit. And it was done by holding that, as his security did depend upon the safety of the property, he had an interest in its preservation, and so had such interest as that he might take out a policy upon it against loss by fire, without meeting the objection that it was a wagering policy. The policy did not, therefore, become one upon the debt, and for indemnification against its loss, but still remained one upon the property and against loss or damage to it. It is, doubtless, true, as is said by GIBSON, J., in 17 Penn. (*supra*), that in effect it is the debt which is insured. It is only as an effect, however; an effect resulting from the primary act of insurance of the property which is the security for the debt. It is the interest in the property which gives the right to obtain insurance, and the ownership of the debt, a lien upon the property, creates that interest. The agreement is usually, as it is in fact in this case, for insuring, from loss or damage by fire, the property. The interest of the mortgagor is in the whole property, just as it exists, undamaged by fire at the date of the policy. If that property is consumed in part, though what there be left of it is equal in value to the amount of the mortgage debt, the mortgage interest is affected. It is not so great, or so safe, or so valuable, as it was before. It was for indemnity against this very detriment, this very decrease in value, that the mortgagee sought insurance and paid his premium.

To say that it is the debt which is insured against loss, is to give to most, if not all, fire insurance companies a power to do a kind of business which the law and their charter do not confer. They are privileged to insure property against loss or damage by fire. They are not privileged to guarantee the collection of debts. If they are, they may insure against the solvency of the debtor. No one will contend this; and, it will be said, it is not by a guaranty of the debt, but an indemnity is given against the loss of the debt by an insurance against the perils to the property by fire.

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This is but coming to our position — that it is the property which is insured against the loss by fire, and the protection to the debt is the sequence thereof. As the property it is which is insured against loss, it is the loss which occurs to it which the insurer contracts to pay, and for such loss he is to pay within the limit of his liability, irrespective of the value of the property undestroyed. So as to the remark, that it is the capacity of the property to pay the debt which is insured. This is true in a certain sense; but it is as a result and not as a primary undertaking. The undertaking is that the property shall not suffer loss by fire; that is, in effect, that its capacity to pay the mortgaged debt shall not be diminished. When an appreciable loss has occurred to the property from fire, its capacity to pay the mortgaged debt has been affected; it is not so well able to pay the debt which is upon it. The mortgage interest, the insurable interest, is lessened in value, and the mortgagee, the insuree, is affected, and may call upon the insurer to make him as good again as he was when he effected his insurance.

Another consideration: It is settled that when a mortgagee, or one in like position toward property, is insured thereon at his own expense, upon his own motion and for his sole benefit, and a loss happens to it, the insurer, on making compensation, is entitled to an assignment of the rights of the insured. This is put upon the analogy of the situation of the insurer to that of a surety. If this analogy be made complete, then has the insurer no more right to refuse payment of the loss, so long as the insured has other remedy for his debt, than has the surety. One as well as the other, as soon as the creditor's right to make demand is fixed, must respond to it and seek his reimbursement through his right of subrogation; and, indeed, the application of this equitable right of subrogation makes our view of this subject harmonious and consistent with all the rights and interests of all the parties.

As we have viewed and treated this case, we are not required to meet the contention of the defendants, that though the two policies of the plaintiffs and the policy of the defendants be treated as subsisting contracts, nominally for \$1,500, yet, as the premium on but half that sum was paid, there was really insured only the amount of \$7,500. We have not considered it necessary to pass definitely upon the question whether Mrs. Connelly could pursue the plaintiffs upon the policies issued by them.

The fact that the proofs of loss show that there was insurance

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upon the property running to James Connelly, the mortgagor, as the insured, but with a memorandum that the loss, if any, should be payable to David Dows & Co., does not affect the relations of the defendants with Mrs. Connelly and her assignees. It does not appear, from the proofs of loss, that the loss on these policies should be payable to David Dows & Co., as mortgagees of the property, and we are not called upon to make an inference to that effect.

They may have had other claims against Connelly and liens upon his property. This point does not appear to have been raised until the case reached this court. This consideration is of force, for James Connelly, as the insured, had an interest in the policies, the loss whereon was payable to Dows & Co.; and any loss paid upon them would need be in some way applied to his benefit. There are other considerations which suggest themselves growing out of the reciprocal rights and obligations of debtor and creditor, and insured under such a policy, and of Mrs. Connelly and Dows & Co. under their contract, which cannot have a satisfactory or safe determination without all the facts which both sides might furnish. The varied suggestions, interrogatively put by the learned counsel for the defendants on his points, show that there may be many facts lacking necessary to a satisfactory solution, and which might, perhaps, have been produced had the point been made at the trial court.

We have considered the many interesting points presented by the learned counsel for the defendants, but are not able to find sufficient ground for the reversal of the judgment appealed from.

The judgment should, therefore, be affirmed.

All concur, except CHURCH, Ch. J., not voting.

*Judgment affirmed*



## HARRIS V. JEX, appellant.

(55 N. Y. 481.)

*Payment—legal tender notes—effect of decisions of United States court—discharge of mortgage.*

A party to a contract has a right to rely on the decision of the highest judicial tribunal in the land as to the law governing his contract.

A mortgage was executed before the passage of the legal tender act. After the decision of the United States Supreme Court (*Hepburn v. Griswold*, 8 Wall. 605) declaring the act void as to contracts made prior to its passage, the grantee of the mortgagor tendered payment of the mortgage debt in legal tender notes, which the mortgagee refused. Subsequently the United States Supreme Court reversed its decision. *Knox v. Lee*, 12 Wall. 457. *Held*, that the tender did not discharge the lien of the mortgagee, it being insufficient according to the law as then declared. (*See note*, p. 288.)

ACTION by Rose Harris against Joshua Jex and another to foreclose two mortgages executed, the one in 1858, and the other in 1861. The mortgaged premises were conveyed to defendant Jex, subject to the mortgages. He showed a tender of the amount of the mortgage debt in legal tender notes in 1870, which was refused. There was a judgment in favor of plaintiff, which was affirmed at general term. Defendant Jex appealed to this court.

A. R. Dyett, for appellants. The tender was sufficient. *Knox v. Lee*, 12 Wall. 457; *Parker v. Davis*, id. The effect of the tender was to discharge the lien of the mortgage. *Kortright v. Cady*, 21 N. Y. 343; 43 Barb. 48; 4 id. 279; 9 id. 432; 1 Johns. Ch. 112; 2 id. 51, 60; 6 id. 166; 2 Barb. Ch. 501; 6 Paige, 390. Plaintiff was not entitled to any judgment against any of the defendants. 29 Barb. 524; 1 Duer, 412; 12 N. Y. 75.

Everett P. Wheeler, for respondent. The alleged tender and refusal did not discharge the lien of the mortgages. *Freeman v. Auld*, 44 N. Y. 50, 54; *Garnsey v. Rogers*, 47 id. 233. The validity of the tender must be adjudged according to the law as it was when the tender was made. *Hepburn v. Griswold*, 8 Wall. 403; 1 Kent's Com. 472, 473, notes; *Van Rensselaer v. Hays*, 19 N. Y. 68; 2 Bacon's Works (Phila. ed.) 479; 2 R. S. (Edm. ed.) 602, § 66; *Gelpcke v. Dubuque*, 1 Wall. 175, 206; *Havemeyer v*

*Iowa Co.*, 3 id. 294; *Olcott v. Fon du Lac*, 5 Chic. L. N. 387, May 17, 1873; *Ohio Co. v. Debolt*, 16 How. (U. S.) 432; *Woodruff v. Woodruff*, 8 Alb. L. J. 233. Refusal by plaintiff of the tender was necessary to discharge the lien. *Kortright v. Cady*, 21 N. Y. 345.

ANDREWS, J. The mortgages, to foreclose which this action was brought, were executed prior to the enactment by congress, in 1862, of the act known as the legal tender act, to secure the payment by the mortgagor to the mortgagee of the sum of \$7,000, according to the condition of certain bonds, bearing even date with the mortgages. The time for the payment of the mortgage debt was subsequently extended, by an agreement between the parties, to the 1st of March, 1870, and on that day the defendant Jex, who had become the grantee of the mortgaged premises, by a conveyance which in terms was made subject to the mortgages, but which contained no covenant on his part to them, tendered to the plaintiff, to whom the bonds and mortgages had been assigned, the amount of the mortgaged debt in United States legal tender notes in satisfaction of the mortgages. The plaintiff refused to accept them on the ground that she was entitled to payment in gold or in its equivalent in currency. This action was then brought, and the only question presented upon the record is whether the tender discharged the lien of the mortgage.

The case of *Kortright v. Cady*, 21 N. Y. 343, is relied upon by the defendant as decisive of the question in his favor. In that case the defendant Cady was the grantee of the equity of redemption under a full covenant warranty deed, which purported to grant the whole estate, and which made no mention of the mortgage. He tendered to the plaintiff, after suit commenced to foreclose the mortgage, the amount of the mortgage debt, with costs, which was refused, and set up in his answer the tender in bar of the further maintenance of the action. It was held that the tender discharged the lien of the mortgage, although there was no averment of a readiness to pay the debt, and the money was not brought into court. We deem it unnecessary to consider whether there is such a distinction between the facts in this case and those which appeared in *Kortright v. Cady*, as to call for the application of a different rule in respect to the legal effect of the tender made by the defendant from that applied in that case. The legal tender

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act, by its terms, made the notes authorized to be issued under it lawful money and a legal tender in payment of all debts, public and private, within the United States, with certain exceptions not necessary to be noticed. The Supreme Court of the United States, in *Hepburn v. Griswold*, 8 Wall. 605, determined that the act, so far as it related to debts existing at the time of its passage, was a violation of the constitution of the United States, and was void. The court declared that contracts for the payment of money made before that time were, in legal effect, contracts for payment in coin, and that congress could not compel a creditor to accept legal tender notes in payment of debts antecedently created. The tender made by the defendants was made after the decision in *Hepburn v. Griswold* had been pronounced, and before its reversal by the case of *Knox v. Lee*, 12 Wall. 457.

It is insisted on the part of the defendant that, notwithstanding the fact that at the time the tender was made the Supreme Court of the United States, the ultimate judicial authority on all questions arising under the constitution and laws of the United States, had decided that the legal tender act, so far as it applied to debts like that of the plaintiff, was void, and that he was entitled to demand payment of his debts in coin, yet he was bound to know the law to be as it was subsequently declared, and that a refusal to accept the tender involved the loss of his security. I think the law did not impose upon the plaintiff so unreasonable a burden. The claim is sought to be justified by the maxim, *ignorantia juris non excusat*, the reason of which is stated by Lord ELLENBOROUGH, in *Bilbie v. Lumley*, 2 East, 469, to be, that otherwise there is no saying to what extent the ignorance might not be carried, and that it would be urged in almost every case. The reason of the rule has no application to a case like this. The plaintiff had a right to repose upon the decision of the highest judicial tribunal in the land. It was, as applied to the relations between these parties and to this case, the law, and not the mere evidence of law. Respect for the decisions of courts is a duty inculcated by writers upon the law, and enforced by considerations of public policy. It is said by Kent (1 Com. 476): "If a decision has been made upon solemn argument and mature deliberation, the presumption is in favor of its correctness, and the community have a right to regard it as a just declaration or exposition of the law, and to regulate their action and contracts by it." The transactions of life would

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be involved in great and distressing perplexity and uncertainty, if the maxim quoted is to be applied and extended to cases like this. It is provided in this State, by statute (3 R. S. 624, § 66), that every act done in good faith, in conformity with a construction by the Supreme Court of any penal or other statute, after such decision was made and before reversal by the Court for the Correction of Errors, shall be so far valid that the party doing said act shall not be liable to any penalty or forfeiture therefor.

In the absence of a statutory provision covering this case, I am of opinion that the same equitable principle should be applied as is contained in the statute cited, and that it should be held that the tender by the defendant did not discharge the lien of the mortgage, it being insufficient according to the law as then declared.

If the tender had been kept good, the defendant might have been discharged from the payment of interest and costs.

The judgment should be affirmed, with costs.

All concur.

*Judgment affirmed.*

NOTE. — This case comes within a rule now well established and which was thus stated by Chief Justice TANEY in *Ohio Life and Trust Co. v. Debolt*, 16 How. 423: "If a contract when made was valid by the laws of the State, as then expounded by all departments of its government and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent act of the legislature of the State or decision of its courts altering the construction of the law."

The leading case holding this decision is *Gelpcke v. Dubuque*, 1 Wall. 173. The State decisions had held county bonds issued in aid of railroads to be valid under the State constitution and then the plaintiff acquired his rights; but afterward the State courts overruled their former decisions. The Supreme Court of the United States, following the rule laid down in *The Trust Co. v. Debolt*, refused to be bound by the last State decisions. — MILLER, J., dissented. See, also, *Rowan v. Runnels*, 5 How. 133; *Havemeyer v. Iowa County*, 3 Wall. 294; *Thomson v. Lee County*, id. 331; *Larned v. Burlington*, 4 id. 275; *City of Kenosha v. Lamson*, 9 id. 477; *Cleott v. Supervisors*, 16 id. 678; *Supervisors of Carroll County v. United States*, 18 id. 71.

See, also, a very elaborate examination of this subject, 9 Am. Law Rev. 321. — *REV.*

## BERNARD V. CAMPBELL, appellant.

(55 N. Y. 456.)

*Vendor and Vendee.—Purchase from apparent owner. When vendee does not acquire title as against real owner. Estoppel.*

Two things must concur to create an estoppel by which an owner may be deprived of his property, by the act of a third person, without his assent: (1) The owner must clothe the person assuming to dispose of the property with the apparent title to, or authority to dispose of it; and (2) the person alleging the estoppel must have acted and parted with value upon the faith of such apparent ownership or authority, so that he will be the loser if the appearances to which he trusted are not real.

Defendants purchased of J., and paid for, a quantity of linseed. At the time of the purchase J. did not have the linseed; but three days afterward he procured a quantity of plaintiffs, by fraudulent representations, and delivered it to defendants with the bill of lading. *Held*, that the plaintiffs could recover the linseed of defendants.

ACTION of replevin by George M. Barnard *et al.* against George W. Campbell *et al.* to recover possession of 1,370 bags of linseed. Defendants were merchants in New York, and on August 21, 1863, they purchased of the broker of E. P. Jeffries, of Boston, 1,800 bags of linseed. They also forwarded their notes to Jeffries in payment of the linseed. Jeffries did not have the linseed at the time of the sale; but on the 24th of August he purchased of plaintiffs, and, by fraudulent representations, induced them to deliver 1,370 bags of linseed, which he shipped to defendants. He also forwarded a bill of lading on the 25th by mail. On the 27th Jeffries failed; and on the arrival of the seed in New York plaintiff demanded it. Defendants obtained a judgment, which was reversed at general term and a new trial granted. Defendants appealed to this court.

*James C. Carter*, for appellants. Defendants purchased in good faith and for value, and their title cannot be impeached after a delivery of the possession of the goods. *Benj. on Sales* (2d Eng. ed.) 342, *et seq.*; *Mowrey v. Welch*, 8 Cow. 238; *Root v. French*, 13 Wend. 570; *Caldwell v. Bartlett*, 3 Duer, 341; *Keyser v. Harbeck*, *id.* 373, 391; *White v. Garden*, 10 C. B. 919; *The "Marie Joseph,"* 1 L. R. (P. C.) 219; *Taylor v. Gatt*, 10 Barr. 431; *Kingsford v. Merry*, 11 Exch. 577. It was not necessary to make

defendants *bona fide* purchasers to show that they received the property before or simultaneously with parting with the consideration. *Pickering v. Busk*, 15 East, 33; *Crocker v. Crocker*, 31 N. Y. 507; *McNeil v. Tenth Nat. Bank*, 46 id. 325; *Weaver v. Barden*, 49 id. 286; *Hoffman v. Noble*, 6 Met. 69; *Neal v. Williams*, 18 Me. 391; *Rowley v. Bigelow*, 12 Pick. 306; *Coggell v. H. & N. Y. R. R. Co.*, 3 Gray, 545; *Beavers v. Lane*, 6 Duer, 232; *Knights v. Wiffen*, 5 L. R. (Q. B.) 660. Defendants purchased upon the faith of the possession conferred by plaintiffs upon Jeffries, and their title is good. *Knights v. Wiffen*, 5 L. R. (Q. B.) 660; *Gilbert v. Hudson*, 4 Greep, 345; *Bradley v. Obear*, 10 N. H. 477; *Fenby v. Pritchard*, 2 Sandf. 151; *Demrow v. McDonald*, 5 Bosw. 130; *Winne v. McDonald*, 39 N. Y. 233; *Cartwright v. Wilmerding*, 24 id. 521, 533; *Wilmot v. Richardson*, 7 Bosw. 590.

*Edwards Pierrepont*, for respondents. Defendants obtained no better title than their vendor, and none that plaintiffs had not a right to rescind. *Ballard v. Burgett*, 40 N. Y. 314; 1 Smith's L. C. 892, 897; *Root v. French*, 13 Wend. 570. A fraudulent purchaser of goods cannot turn over the same in payment of an antecedent debt. *Coddington v. Bay*, 20 Johns.; *Stalker v. McDonald*, 6 Hill, 93; *Rosa v. Brotherson*, 10 Wend. 86; 16 id. 661; *Spier v. Myers*, 6 Barb. 445; *Wardell v. Howell*, 9 Wend. 70; *Beavers v. Lane*, 6 Duer, 232; *Keeler v. Field*, 1 Paige, 312; *Holbrook v. Vose*, 6 Bosw. 76, 111. Plaintiffs not having conferred any apparent authority upon defendants' vendor, or assented to the sale, defendants acquired no title to the property. *Wooster v. Sherwood*, 25 N. Y. 278; *Beavers v. Lane*, 6 Duer, 232. A new trial was rightly ordered. *McGouldrick v. Willetts*, Alb. L. J., Dec. 6, 1873; *Dows v. Dennistown*, 28 Barb. 393; *Marshall v. N. Y. R. R. Co.*, 45 id. 508.

ALLEN, J. The only question involved in the action is, whether the plaintiffs and original owners or the defendants, the purchasers from Jeffries, the fraudulent vendee of the plaintiffs, have the better title to the merchandise in controversy. That, as against Jeffries, the rights of the plaintiffs to rescind the sale and reclaim the goods, by reason of the fraud of the latter, is perfect, is conceded, and was so held upon the trial. Such right continues as against any one acquiring title under Jeffries, unless under well-

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recognized principles of law, and, under the circumstances of this case, Jeffries could transfer a better title than he had, or the plaintiffs, by their acts, are estopped from asserting title as against a purchaser from him.

But two questions of fact were submitted to the jury: 1. Whether the sale to Jeffries was for cash or upon credit; and 2. If for cash, whether payment was waived and the goods delivered so as, but for the fraud, to vest the property in Jeffries.

The jury found, either that the sale was upon credit, or that the payment of the purchase-price, as a condition precedent to the delivery of the property to and the vesting of the title in Jeffries, was waived, and that the delivery to him was absolute and unconditional; and the defendants had a verdict, under the instructions of the judge, that the equitable rule applied, that when one of two innocent parties must suffer loss by reason of the fraud or deceit of another, the loss shall fall upon him by whose act or omission the wrong-doer has been enabled to commit the fraud; and that the plaintiffs were in the position of a party who lets another have property unconditionally, and thereby enables him to sell the same and receive the purchase-price from a third person; and that in such case the purchaser takes the title. In other words, the plaintiffs were held to be estopped from claiming the goods from the defendants in case the jury found that there had been an unconditional delivery by the plaintiffs to Jeffries, notwithstanding, as the judge at the circuit expressly declared, and as the evidence showed, the defendants purchased the goods from a broker of Jeffries in New York on the twenty-first of August, and paid for them the same day by transmitting their notes to Jeffries, at Boston, who at once negotiated them; and Jeffries obtained neither the property nor any order for its delivery, or documentary evidence of title or of his purchase, until the twenty-fourth of the same month, three days after the transaction was consummated as between Jeffries and the defendants. That is, it was held at the circuit that the subsequently-acquired possession of Jeffries operated by relation to create an estoppel as of the twenty-first of August, in favor of the defendants and against the plaintiffs; and the jury were in terms instructed that the defendants were purchasers in good faith, for value, and acquired a title paramount to that of the plaintiffs, and were entitled to a verdict; and they had a verdict and judgment, upon this view of their rights.

That the defendants were purchasers in good faith, that is, without notice or knowledge of the fraud of Jeffries, or of the defects in his title, for a full consideration actually paid to Jeffries, is not disputed. Both plaintiffs and defendants are alike innocent of any dishonest or fraudulent intent, and one or the other must suffer loss by the frauds of one with whom they dealt in good faith, for legitimate purposes, and with honest intention. Both were alike the victims of the same fraudulent actor, and if one rather than the other of the parties has done any act enabling the fraud to be committed, and without which it could not have been perpetrated upon the other in the exercise of ordinary care and discretion, the loss should, within the rule before referred to, fall on that one of the parties aiding and abetting the fraud, or enabling it to be committed. But good faith, and a parting of value by the one, will not alone determine who should have the loss, or fix the ownership of the property fraudulently purchased from the one and sold to the other. The general rule is that a purchaser of property takes only such title as his seller has, and is authorized to transfer; that he acquires precisely the interest which the seller owns, and no other or greater. *Nemo plus juris ad alium transferre potest quam ipse habet.* Broom's Leg. Max. 452. The general rule of law is undoubted that no one can transfer a better title than he himself possesses. *Nemo dat quod non habet.* Per WILES, J., *Whistler v. Forster*, 14 C. B. (N. S.) 248. To this rule there are, however, some exceptions, and unless the defendants are within the exceptions they must abide by the title of Jeffries.

One of the recognized exceptions applies to negotiable instruments only, and depends for its existence upon the law-merchant and the reasons of public policy upon which that branch of the law rests. To make this exception available, the negotiable paper must be actually transferred by indorsement in the usual form and for value. *Whistler v. Forster*, *supra*; *Muller v. Pondir*, in this court, Dec. 23, 1873 (MSS. Op.); Story on Prom. Notes, § 120, note 1; *Calder v. Billington*, 15 Me. 398; *Southard v. Porter*, 43 N. H. 379. Another exception is in the case of a transfer by indorsement and delivery of a bill of lading, which is the symbol of the property itself, to a *jona fide* purchaser for value, by a consignee to whom the consignor and original owner of the goods has indorsed and delivered it. This exception is founded on the nature of the



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instrument, and the necessities of commerce. The bill of lading, for the convenience of trade, has been allowed to have effect at variance with the general rule of law. But this operation of a bill of lading is confined to a case where the person who transfers the right is himself in possession of the bill of lading so as to be in a situation to transfer the instrument itself, the symbol of the property transferred. *Jenkyns v. Osborne*, 7 M. & G. 678; *Akerman v. Humphrey*, 1 C. & P. 53.

Bills of lading differ essentially from bills of exchange and other commercial negotiable instruments; and even possession of a bill of lading, without the authority of the owner and vendor of the goods, or when obtained by fraud, will not authorize a transfer so as to defeat the title of the original owner, or affect his right to rescind the sale and stop the goods in transit. While possession of a bill of lading, or other document of like nature, may be evidence of title, and in some circumstances and for some purposes equivalent to actual possession of the goods, it does not constitute title, nor of itself affect the operation of the general rule that property in chattels cannot be transferred except by one having the title or an authority from the true owner. *Gurney v. Behrend*, 3 Ellis & Black, 622; *Dows v. Perrin*, 16 N. Y. 325; see also *Saltus v. Everett*, 20 Wend. 267; *Brown v. Peabody*, 3 Kern. 121. Jeffries had no bill of lading from the plaintiff, the vendors of the goods, or any document of like character transferable in the usual course of business, and the transfer and delivery of which to a purchaser for value would have operated as a symbolic delivery of the goods, and been the equivalent of an actual delivery, so as to terminate the right of the plaintiff to rescind the sale and reclaim the goods.

Another exception to the general rule exists in the case of a sale in market overt; but as we have no markets overt, and there are no sales, public or private, known to our law, which relieve the buyer of merchandise from the rule *caveat emptor*, as applied to the title, this exception need not be further considered.

The defendants can only resist the claim of the plaintiffs to the merchandise by establishing an equitable estoppel, founded upon the acts of the plaintiffs, and in the application of the rule applied by the judge at the circuit, by which, as between two persons equally innocent, a loss resulting from the fraudulent acts of another shall rest upon him by whose act or omission the fraud has been made possible. This rule, general in its terms, only operates

to protect those who, in dealing with others, exercise ordinary caution and prudence, and who deal in the ordinary way and in the usual course of business, and upon the ordinary evidences of right and authority in those with whom they deal, and as against those who have voluntarily conferred upon others the usual evidences or *indicia* of ownership of property, or an apparent authority to deal with and dispose of it. In such case, for obvious reasons, the law raises an equitable estoppel, and as against the real owner, declares that the apparent title and authority which exists by his act or omission shall, *quoad* persons acting and parting with value upon the faith of it, stand for and be regarded as the real title and authority. It is not every parting with the possession of chattels or the documentary evidence of title that will enable the possessor to make a good title to one who may purchase from him. So far as such a parting with the possession is necessary in the business of life, or authorized by the custom of trade, the owner of the goods will not be affected by a sale by the one having the custody and manual possession. *Dyer v. Pearson*, 3 B. & O. 38; *Newsom v. Thornton*, 6 East, 17; *Dayton v. Kynns*, 3 B. & A. 320; *Ballard v. Burgett*, 40 N. Y. 314. But the owner must go farther, and do some act of a nature to mislead third persons as to the true position of the title. *Pickering v. Busk*, 15 East, 38.

Two things must concur to create an estoppel by which an owner may be deprived of his property, by the act of a third person, without his assent, under the rule now considered. 1. The owner must clothe the person assuming to dispose of the property with the apparent title to, or authority to dispose of it; and 2. The person alleging the estoppel must have acted and parted with value upon the faith of such apparent ownership or authority, so that he will be the loser if the appearances to which he trusted are not real. In this respect it does not differ from other estoppels *in pais*. *Weaver v. Barden*, 49 N. Y. 286; *McGoldrick v. Willets*, 52 id. 612; *City Bank v. R. W. & O. R. Co.*, 44 id. 136; *Saltus v. Everett*, 20 Wend. 267; *Wooster v. Sherwood*, 25 N. Y. 278; *Brown v. Peabody*, 3 Kern. 121.

In the case before us every element of an estoppel is wanting, and no case was made for the application of the rule by which, under some circumstances, one, rather than the other two innocent persons, is made to bear the loss occasioned by the fraud of a third person.

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The defendants consummated their purchase from Jeffries, acting through his broker in New York, and paid for the merchandise by remitting, at his request, directly to Jeffries, on the twenty-first of August, at which time Jeffries had neither the possession nor right of possession of the property, nor any documentary evidence of title or any *indicia* of ownership, or of dominion over the property of any kind. The plaintiffs had done nothing to induce the defendants to put faith in or give credit to the claim of Jeffries of the right to sell the property. The defendants then parted with the consideration for the purchase of the seed, not upon the apparent ownership of Jeffries, but upon his assertion of right of which the plaintiffs had no knowledge, and for which they are not responsible. Neither did the defendants at any time do or forbear to do any act in reliance upon the apparent ownership of the property by Jeffries, or induced by any act or declaration of the plaintiffs. In *Knights v. Wiffen*, L. R. (5 Q. B.) 660, the plaintiff was induced to rest satisfied under the belief that he had acquired title to the property purchased, and so to alter his position, by abstaining from proceedings to recover back the money which he had paid to his vendor, by the declaration of the defendant that it was all right, and his promise that when the forwarding note should be received he would put the barley on the line. The defendants here at no time had any declaration or statements of the plaintiffs upon which to rely, and were not led to act or forbear to act by any documentary evidence of title in Jeffries emanating from them. There is a manifest equity in holding the owner of property estopped from asserting title as against one who, for value actually paid, has purchased it from one having, by the voluntary act or negligence of the owner, the apparent title with right of disposal, but with this limitation there is no hardship in holding to the rule that the right of property in chattels cannot be transferred unless on the ground of authority or title. Public policy requires that purchasers of property should be vigilant and cautious, at least to the extent of seeing that their vendors have some and the usual evidence of title, and if they are content to rest upon their declarations they may not impose the loss, which is the result of their own incautiousness or credulity, on another. The payment for or parting with value for the goods by the purchaser from the fraudulent vendee lies at the foundation of the estoppel, for, if he has parted with nothing, he can lose

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nothing by the retaking of the goods by the original owner, and that payment must be occasioned by the acts or omissions of such owner. It is the payment that creates the estoppel, and if that is not made in reliance on the acts of the owner, the latter is not and cannot, in the nature of things, be estopped.

The order granting a new trial must be affirmed, and judgment absolute for the plaintiffs.

All concur.

*Order affirmed and judgment accordingly.*

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ARGUS COMPANY V. MAYOR OF ALBANY, appellant.

(55 N. Y. 485.)

*Statute of frauds — designation of official newspapers — minutes of municipal body — appropriation of money.*

The minutes of a resolution of the common council of a city designating an official newspaper and the signature of the clerk of the common council, at the end of the minutes, constitute a note or memorandum in writing signed by the party to be charged within the meaning of the statute of frauds.

The common council of a city, on January 26, 1863, adopted a resolution that an official newspaper be designated for a term of three years, and that the chamberlain enter into a contract, with the newspaper to be designated on terms, and for prices which were expressed in the resolution. This resolution was adopted by a vote of two-thirds of all the members taken by yeas and nays. The common council then designated plaintiff's newspaper, and the resolution and designation were entered in the minutes for the day, at the end of which the clerk signed his name. A contract in writing was then entered into between plaintiff and the chamberlain for the term of three years. On January 16, 1866, the common council resolved that plaintiff's newspaper be designated the official paper "in accordance with the former resolutions of the common council." This resolution was not adopted by a vote taken by yeas and nays, but it was entered in the minutes which were signed by the clerk. Plaintiff subscribed a written acceptance, but no contract was made with the chamberlain. *Held*, (1) that the contract made by the adoption of the resolution of January 16, 1866, was binding on the city, and was not void by the statute of frauds, the minutes of the common council satisfying the requirement that a contract not to be performed within a year shall be expressed by a note or memorandum in writing signed by the party to be charged; and (2) that the resolution of January

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16, 1866, was not an appropriation of money for any purpose, requiring a two-thirds vote, taken by yeas and nays, as required by Laws of 1848, chap. 189, § 1, the purpose having been decided upon by the resolution of January 26, 1863.

ACTION by the Argus Company against the Mayor, Aldermen and Commonalty of the City of Albany for an alleged breach of contract. The common council of defendants on January 26, 1863, adopted the following resolution :

“ *Resolved*, That the proceedings of this board be reported for, and published in, one daily paper, to be designated by the board at an annual expense not to exceed \$1,000; and that all city advertising be published, at the rates prescribed by law for the publication of legal notices, in the same paper, such designation to be for the term of three years; also, that all printing and binding chargeable to the city be done by the proprietor or proprietors of such paper for the like term, at the rates current in the city, and that the chamberlain be and he is hereby authorized and directed to enter into contract accordingly with such proprietor or proprietors as the board may designate.”

This resolution was adopted by a vote of two-thirds of all the members taken by yeas and nays. The *Atlas and Argus* was designated as the official paper; and the resolution and designation were entered in the minute book, and the minutes for the day were signed by the clerk of the council. On January 27, 1863, the chamberlain entered into a written contract with plaintiff, the publisher of the *Atlas and Argus*, for three years. On January 16, 1866, the common council adopted the following resolution:

“ *Resolved*, That the *Argus* be, and hereby is, designated as the official paper, in accordance with the former resolutions of the common council, establishing an official organ for the city.”

This resolution was not adopted by a vote taken by yeas and nays, but the resolution was entered on the minutes, which were signed by the clerk. Plaintiff subscribed and filed an acceptance thereof, January 27, 1866, but no contract was made with the chamberlain. Plaintiff continued to publish the proceedings of the common council for three years thereafter. In June, 1866, the common council rescinded its resolution of January 15, 1866, and amended its resolution of January 26, 1863, striking out the clause as to publication of its proceedings, and giving the other printing provided for to other papers.

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Plaintiff claims to recover the price for publishing the proceedings at \$1,000 per annum, and the profits on the work given to other papers—in all about \$6,000. The referee decided that the resolution of January 16, 1866, would have been binding if it had not been within the statute of frauds; but the contract was not to be performed within one year, and not subscribed by defendants, and was void. He decided that plaintiff was entitled to recover the sum of \$105.55, for publishing the proceedings of the common council from April 27, 1866, to June 4, 1866, when the resolution of rescission was adopted. The general term reversed the judgment and granted a new trial. The defendants appealed to this court.

*N. C. Moak*, for appellants. The resolutions under which plaintiff seeks to hold defendants did not, without resort to extrinsic evidence, fix the terms of the contract and the sums to be paid, and were not binding under the statute of frauds. 2 R. S. 135, § 2; Edm. Stat. 140; *Jones v. Hay*, 52 Barb. 507, 508; *Wright v. Weeks*, 3 Bosw. 372; 25 N. Y. 153; *Stocker v. Patridge*, 2 Rob.; *Goodman v. Griffiths*, 1 Hurl. & Norm. 574. The contract provided for in the resolution was not binding on defendants until reduced to writing and executed by the parties. *Governor, etc., v. Pitch*, 10 Exch. 610; *Riggs v. Magruder*, 2 Cranch, 143; Add. on Con. (6th Eng. ed.) 15; *Wood v. Midgeley*, 5 De G., McN. & G. 41. The passage of the resolution designating *The Argus* as the official paper did not make an agreement with its proprietors. *Browne on Stat. of Frauds*, § 354; *Parker v. Parker*, 1 Gray, 409; *Sanborn v. Sanborn*, 7 id. 142-144, 146; *Grant v. Levan*, 4 Penn. St. (4 Barr.) 393, 421-426; *Johnson v. Brooke*, 31 Miss. 17; *Robinson v. Cushman*, 2 Denn. 153; *Jackson v. Luke*, 12 Wend. 105. The letter of acceptance filed by the plaintiff with the clerk did not bind defendants. *Bailey v. Ogden*, 3 Johns. 396; *De Beerski v. Paige*, 36 N. Y. 539; 47 Barb. 172; *James v. Patten*, 6 N. Y. 9. There was no ratification of the alleged contract. *Haydock v. Stow*, 40 N. Y. 370. Part performance of an agreement void by the statute of frauds will not validate it. *Jones v. Hay*, 52 Barb. 501; *Lockwood v. Barnes*, 3 Hill, 130; *Bartlett v. Wheeler*, 44 Barb. 162; *Johnson v. Mulry*, 4 Rob. 401. If the resolution created an office, plaintiff could not hold it and it could be abolished at any time. *People v. Batchelor*, 22 N. Y. 128; *Corp. v. Mayor*, 5 Cow. 538. The resolution of January 5, 1866, was void because the year and

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nays were not entered upon the journals. *Laws* 1848, chap. 189, § 1, p. 217; *Morris v. City of Lawrence*, 98 Mass. 219, 221; *Cowen v. Vill. of W. Troy*, 43 Barb. 49; *McSpeddon v. Mayor*, 7 Bosw. 601; *Donovan v. Mayor*, 33 N. Y. 291; *Brady v. Ballard*, 59 Ill. 414. A municipal corporation cannot ratify the acts of its officers so as to render the corporation liable. *Cowen v. Vill. of W. Troy*, 43 Barb. 48.

*Samuel Hand*, for respondent. The contract made by the adoption of the resolution of January, 1866, was not void under the statute of frauds. 2 R. S. 135, § 2; *id.* 136, § 8. It was not necessary that the memorandum of the contract should be in a single writing. *Broom on Com. Law*, 383; *Allen v. Bennett*, 3 Taunt. 169, 178; *Wright v. Weeks*, 25 N. Y. 153, 160; *Vassar v. Camp*, 1 Kern. 441. A written proposal, containing the terms of a projected contract, signed by defendants and assented to by plaintiff, is a compliance with the statute. *Broom on Com. Law*, 384; *Smith v. Neale*, 8 Eng. C. L. 67; *Reuss v. Picksley*, L. R. (1 Exch.) 342. The written evidence of the contract was sufficient to ascertain what the bargain was, without parol proof. *Justice v. Lang*, 42 N. Y. 493, 501; *Hoadly v. McLaine*, 10 Taunt. 482; *Ashcroft v. Morrin*, 4 M. & Gr. 450. The clerk of the common council was defendants' agent for signing these minutes. *Laws* 1842, chap. 275, § 11. His signature as clerk of the common council was sufficient. *Dykens v. Townsend*, 24 N. Y. 57; *Fenley v. Stewart*, 5 Sandf. 101; *Chase v. City of Lowell*, 7 Gray, 35. It was not necessary to prove a formal communication of the memorandum to plaintiff. *Gibson v. Holland*, L. R. (1 C. P.) 1; *Hawkins v. Holmes*, 1 P. Wms. 771; *Smith v. Watson*, Bun. 55. Defendants had no power to annul the contract without plaintiff's consent. *Chase v. City of Lowell*, 7 Gray, 35, 36.

FOLGER, J. The plaintiff seeks to recover upon an agreement which, by its terms, was not to be performed within one year from the making thereof. It can do so if the agreement, or some note or memorandum, is in writing and subscribed by the party to be charged thereby. 2 R. S. 135, § 2 (as amended, *Laws* of 1863, chap. 464, p. 802), sub. 1.

In this case the party to be charged, and whose subscription is needed, is the defendant, a municipal corporation. It is plain that

such a defendant can make no note or memorandum, nor subscribe the same, save by an officer or agent thereof. It is so, also, that it ordinarily acts by its legislative or governing body, and that the action of that body is expressed in the minutes of its action, recorded, as it takes place, in the books kept for that purpose by its clerk or secretary. Hence it is that its agreements are rarely oral, but, *pari passu* with the making of them, they are, on the instant of formation, put into writing, and thus a note or memorandum of them is made; and the minutes of the day's doings of the body, being signed by the clerk thereof, there is a subscription of the note or memorandum, made by the party, by its agent duly authorized. This is a satisfactory compliance with the statute. It meets the purpose and intention of the law, by providing an enduring and unchanging evidence of the agreement; and it meets its letter, for there is some note or memorandum of it in writing, subscribed by the party to be charged thereby, the subscription made by an authorized agent. And so are the authorities. *Johnson v. Trinity Ch. Society*, 11 Allen, 123; *Tufts v. Plymouth Gold Mining Co.*, 14 id. 407; *Chase v. City of Lowell*, 7 Gray, 35; *Dyke v. Townsend*, 24 N. Y. 57.

The resolution of the 26th of January, 1863, is a full note or memorandum of an agreement as to the work which the defendant agreed to have done. Nor did this resolution expire by any limitation of its own, at the end of three years from its adoption, and so require a new passage to be still operative. Until rescinded in terms, it was lasting in its expression of a determination by the city to have its printing done at certain rates, by one daily paper to be designated by the city. It was this designation only which had a limit to a term of three years. The resolution, as to all but the party with whom the agreement was to be, was perpetual, unless rescinded by action of the city; and it needed nothing but the designation of some daily paper, at the end of each term of three years, entered upon the daily minutes, signed by the clerk, to do all which the city need do, to make a note or memorandum in writing, subscribed by the party to be charged thereby.

The resolution of 15th January, 1866, also recorded in the minutes and signed by the clerk, designating anew the plaintiff's daily paper, started another term of three years. For the agreement was already there, save the name of the party to be agreed with, and that this resolution supplied.



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Nor did this last resolution need to be passed with a call of the yeas and nays, and they entered upon the record. It was not a law or a resolution involving an appropriation or payment of money for any purpose. (Laws of 1848, chap. 139, p. 217, § 1.) The purpose was decided upon by the former resolution. The design of the provision of the act of 1848 is to expose to accountability to the public those who, in places of public trust, sanction new objects and purposes for the expenditure of public money. An expenditure having been once determined upon, it does not again involve it, that, by resolution, one is selected to do the work, any more than where an office under the city government, having been created by resolution, and a compensation having been attached to it, by a subsequent resolution one is named to fill it.

Nor does the resolution contemplate that the chamberlain is to negotiate for the publication of the proceedings of the board at a sum less than \$1,000. It is a proposal—in connection with the other resolution, designating the plaintiff's paper as the official organ—to the plaintiff, to pay it not to exceed \$1,000 for doing certain work; the plaintiff's answer is an acceptance of that sum and an agreement to do the work therefor. It is different from *Haydock v. Stow*, 40 N. Y. 364. That was a power intrusted to an agent, with a *minimum* limit of price, but no *maximum*; and hence the duty of the agent to his principal to obtain more if he might. This is an offer by one party to another, which the other accepts without intervention of an agent, and the *maximum* compensation named is the compensation agreed for. Besides, the direction to the chamberlain does not contemplate any change of the terms of the resolution; he is directed to enter into a contract *accordingly*, i.e., in the terms specified in the resolution. Moreover, before the second resolution of designation, he has already done his duty in making the contract with which the defendant is satisfied. The second resolution, of January 16, 1866, is an offer by the defendant to renew it for another term of three years; and so the defendant does not remain free from obligation, under that resolution, until the chamberlain has again entered into a contract. The contract which he was directed to make, expressing no more in fact than the resolution of 1863, was satisfactory to defendant. The defendant, agreeing to the terms of that resolution and contract, by the resolution again designating the daily paper of the plaintiff, proposed to it to renew the same for

another term of three years. As soon as the plaintiff signified in writing its acceptance of that proposal, the contract was renewed for another three years' term, and, as we have seen, was legally embodied in writing, and was subscribed according to the statute. A letter from a party to be charged, specifying the terms of an agreement, and directing an assignment to be drawn in accordance with it, is a good memorandum of the contract, though the assignment never be made. See *Smith v. Watson*, cited in *Gibson v. Holland*, Law Rep., 1 Com. Pl. 6. The common council did not contemplate not being bound, until a contract other than the resolutions and some acceptance of it was made. Those cases which have turned on such point have been where a further contract was needed to express the details of the bargain, where those had yet to be arranged between the parties.

Nor does the fact that the rates for printing and binding are not expressed, but reference is made to something outside of the contract, and which must be established by parol testimony, invalidate the contract. This contract is not so much open to objection for this cause, as if no price was expressed, nor reference made to any thing by which it might be determined, and the parties were left to proof of a *quantum meruit*. Yet, in such case, a memorandum has been held to be in compliance with the statute. *Hoadley v. McLaine*, 10 Bing. 482; *Ashcroft v. Morrin*, 4 M. & G. 450. The first resolution does not require that the chamberlain ascertain what the current rates are, when he enters into his contract, and make them the rule of compensation the three years through. What he is to do, if he does aught, is to put into his contract the phrase of the resolution. For the designation and the contract is for three years; and the rates current at the beginning of the term may be quite different from those current in any other part thereof. Yet it is for the rates current in the city, at any time and at all times through the term of three years, that the defendant contracts, willing to pay its designated official paper so much and no more, and asking work for no less than at the terms current for the same service, in the city where the work is done, from time to time.

Nor is the idea that there was no delivery to the plaintiff of the resolution of 1866, one that can prevail. There had once been delivery of the same agreement and performance of it by both parties. It was not changed. The resolution of 1866 was but a proposal to the plaintiff to renew it. It was adopted 16th

January, 1866. The first term of three years did not end until 26th January, 1866. Until that day, under the first contract, all proceedings of the common council were reported for, delivered to, and published in, the paper of the plaintiff. The resolution of January, 1866, at once on its passage, was reported for and delivered to the plaintiff, to the knowledge of the defendant's agents. Nor is it always needed that there be delivery to the other contracting party, to bind the one who is sought to be charged by the note or memorandum. Where one, by his agent, has dealt with another, a written communication to the agent, reciting the term of the agreement made by the agent with that other, and ratifying the same, will answer the statute. *Gibson v. Holland, supra*. And so will a written communication to the other, expressive of the terms, yet repudiating an obligation. *Bailey v. Sweeting*, 9 C. B. (N. S.) 843. The plaintiff did accept the proposal for a renewal, by filing its written acceptance with the clerk of defendant. The clerk had no authority to make a contract or to assent to a proposition for one. But he was the custodian of the papers of the common council, and an organ of communication between it and those not members of it. It also accepted it, by acting under it to the knowledge and with the assent of defendant's agents. *Smith v. Neale*, 2 C. B. (N. S.) 66.

The plaintiff has a good cause of action on the contract; but for the reason given by the general term, it was proper that there should be a new trial, rather than judgment absolute ordered in that court. But there being a stipulation under the eleventh section of the Code on appeal to this court, the order of the general term should be affirmed, and judgment absolute for the plaintiff.

All concur, except GROVER and RAPALLO, JJ., dissenting.

*Judgment accordingly.*

**PRATT V. NEW YORK CENTRAL INSURANCE COMPANY, appellant.**

(85 N. Y. 585.)

*Fire insurance — waiver of forfeiture — proof of loss.*

There a policy of fire insurance is forfeited by a change in the title of the insured property, and the agent of the insurers informs the person for whose benefit the policy was issued, that the policy will be allowed to stand, the insurers cannot, after a loss by fire, elect to declare the policy void.

Plaintiff, who had a mortgage interest in property, applied to defendant's agent for an insurance thereon. The form of the policy was left to the judgment of the agent, who made out a policy to the mortgagors, payable to plaintiff in case of loss. The policy contained a condition that a change in the title of the property, without defendant's written consent, would avoid the policy. The mortgage was subsequently foreclosed and plaintiff became the purchaser. Plaintiff informed the agent of the change in title, and was told that the policy might stand. A loss by fire having occurred, *held*, that defendant was liable on the policy.

Where proofs of loss are prepared in conformity with the direction of an insurance company's agent and submitted to the company, which retains them for several days and then sends a general notice to the person claiming under the policy that the proofs are defective, without specifying in what particular, additional proofs need not be furnished.

ACTION by Eugene B. Pratt against the New York Central Insurance Company upon a policy of fire insurance. Plaintiff having a mortgage on certain property applied to defendant's agent for an insurance upon his interest. The form of the policy was left to the judgment of the agent, who made out the policy in form to the owners of the property, "loss, if any, payable to E. B. Pratt, as his interest may appear." The premium was paid by plaintiff. The policy contained a clause, that if there was any change of title or foreclosure of a mortgage, without the consent of the company indorsed thereon, the insurance should immediately cease. In case of claim for loss made payable to another party as collateral security, proof of loss was to be made by the party originally insured.

The mortgage was afterward foreclosed and plaintiff became the purchaser of the mortgaged premises. He then gave notice of the change in title to defendant's agent, who said that the policy might stand as security for plaintiff's interests, and that the proper entries would be made in the books. The next night the insured property was burned. The mortgagors declined to furnish proofs of loss;

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plaintiff procured a blank of the agent, and under his instructions made out the proofs.' These proofs were received by defendant May 26, 1871, and retained by it. On June 6, 1871, defendant notified plaintiff that the proofs were not in conformity with the policy and would not be recognized as proofs. No additional proofs were made. The trial was without a jury and plaintiff obtained judgment, which was affirmed at general term. Defendant appealed to this court.

*W. E. Hughitt*, for appellant. Plaintiff was only defendant's agent to receive the insurance money and account to the mortgagors. *Frink v. Hampden Ins. Co.*, 45 Barb. 384. The additional insurance procured by the mortgagors avoided this policy by its terms. *Gilbert v. Phoenix Ins. Co.*, 36 Barb. 372; *Bigler v. N. Y. C. Ins. Co.*, 22 N. Y. 402; *Grosvenor v. At. Ins. Co.*, 17 id. 391, 401; 43 id. 389. By consenting to the sale, defendant did not waive the forfeiture on account of the other insurance by the mortgagors, of which it had no knowledge or notice. *Smith v. Sar. Co. M. F. Ins. Co.*, 3 Hill, 508; 22 N. Y. 402. Knowledge of the matter claimed to be waived is a prerequisite to waiver. 45 N. Y. 138, 149; 46 Barb. 333; 30 id. 580; 37 id. 29; 38 id. 402, 569; 4 Bosw. 188, and cases; 7 Hill, 49; Phil. on Ins., chap. 9, § 13; 32 Conn. 31; 7 Johns. 237; 5 Barb. 339, 359; 5 Duer, 507; 46 N. Y. 413; 2 Abb. (N. S.) 199, and cases cited; 48 Barb. 148. Plaintiff is bound by his proofs of loss. 1 Bosw. 514. Defendant gave plaintiff due notice that his proofs were defective. *Cornell v. Le Roy*, 9 Wend. 163; Phil. on Ins. 1813; *Kimball v. Ham. Ins. Co.*, 8 Bosw. 503.

*L. C. Gardner*, for respondent. The acts of the agent's clerk were binding on the company. *Bodine v. Ex. F. Ins. Co.*, 51 N. Y. 117. Defendant became the insurer of plaintiff from the time he received the consent from the clerk of defendant's agent. *Fish v. Cottenet*, 44 N. Y. 538; *Sherman v. Nia. F. Ins. Co.*, 46 id. 526; *Wilson v. Hill*, 3 Met. 66; *Foster v. Ex. Ins. Co.*, 3 Gray, 219; *Flanders on F. Ins.* 317. Even if the clerk acted without authority, there was a ratification by defendant's agent and secretary. *Buchanan v. West. Ins. Co.*, 5 Alb. L. J. 334; *Benedict v. Smith*, 10 Paige, 126; *Brigham v. Peters*, 1 Gray, 139; *Rauth v. Thompson*, 13 East, 274; 4 Edm. 1; Para. on Con. 46, 47, 70, 72; *N. H. Del. Bridge v. Phenix Bk.*, 3 N. Y. 166; *Vienna v. Barkley*, 3 Cow

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382; *Cairnes v. Bleeker*, 12 Johns. 300; *Johnson v. Jones*, 4 Barb. 369. Parol insurance is good. *Ellis v. Alb. City F. Ins. Co.*, 50 N. Y. 402; *Fish v. Cottonet*, 44 id. 538; 4 Lans. 433; *Trustees, etc., v. Brooklyn F. Ins. Co.*, 19 id. 306; *Audubon v. Ex. F. Ins. Co.*, 27 id. 216; *Rockwell v. Hart. F. Ins. Co.*, 4 Abb. 179; *Post v. Aetna F. Ins. Co.*, 43 Barb. 251; *Rhodes v. R. R. Pass. Ins. Co.*, 5 Lans. 71. The second insurance was void on account of plaintiff's policy and could not affect it. *Jackson v. Mut. Ins. Co.*, 23 Pick. 48; *Clark v. New Eng. Ins. Co.*, 6 Cush. 342; *Gale v. Belknap Ins. Co.*, 41 N. H. 170; *Philbrook v. N. Eng. Mut. Ins. Co.*, 37 Me. 137; *Jackson v. Farmers' Ins. Co.*, 5 Gray, 52; *Stacy v. Frank. Ins. Co.*, 2 W. & S. 506; *Handy v. U. Mut. F. Ins. Co.*, 4 Al. (Mass.) 217; *Schenck v. Mercer Co., Ins. Co.*, 4 Zab. 447; *Hubbard v. Hart. F. Ins. Co.*, 33 Iowa, 328; 8 Alb. L. J. 53; *Mursey v. Atlas Mut. Ins. Co.*, 14 N. Y. 79; *Flanders on F. Ins.* 49, 50, and cases cited. The second policy, having been declared void and canceled, could not affect plaintiff's policy. *Power v. Ocean Ins. Co.*, 19 La. 28; *N. E. F. & M. Ins. Co. v. Schettler*, 38 Ill. 166; *Schmidt v. Peoria M. & F. Ins. Co.*, 41 id. 166; *Ins. Co. of N. A. v. McDowell*, 50 id. 120; *Morrison v. Tenn. M. & F. Ins. Co.*, 18 Me. 262; *Obermeyer v. Globe Mut. F. Ins. Co.*, 13 id. 44; *Mitchell v. Lyc. M. Ins. Co.*, 51 Penn. St. 409; 1 Phil. on Ins. (5th ed.) 478; *Flanders on Ins.* 50, and cases cited. If plaintiff's proofs were defective they should have been returned at once, or notice of the defects should have been specifically and promptly pointed out. *Bodle v. Chenango Co. Mut. Ins. Co.*, 2 N. Y. 58; *O'Neil v. Buff. F. Ins. Co.*, 3 id. 128; *Kernochan v. N. Y. B. Ins. Co.*, 17 id. 439; *Burnsted v. Div. Mut. Ins. Co.*, 12 id. 81; *Aetna Ins. Co. v. Tyler*, 16 Wend. 402; *O'Conner v. Hart. F. Ins. Co.*, 25 id. 374; *Post v. Aetna Ins. Co.*, 43 Barb. 351. The proofs of loss were made as directed by defendant's secretary, and defendant is estopped from objecting to their sufficiency. *Frost v. Sar. Mut. Ins. Co.*, 5 Den. 54; *Carpenter v. Stillwell*, 11 Wend. 73. The findings of facts are conclusive. *Loeschigk v. Peck*, 3 Rob. 700; *Foot v. Roberts*, 7 id. 17; *Ritter v. Cushman*, id. 294; *Hatch v. Fogerty*, id. 488. It is not error for the court to omit to state in its findings all the facts material to the issue. *Manley v. Ins. Co. of N. A.*, 1 Lans. 20; *McKeon v. See*, 4 Rob. 449; *Ashley v. Marshall*, 29 N. Y. 494; *Smith v. Coe*, 20 id. 666.

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ANDREWS, J. There are no exceptions to the admission or rejection of evidence relied upon for the reversal of the judgment. The action was tried by the court without a jury. The judge made a finding of facts, and found as a conclusion of law that there was a valid contract of insurance between the parties at the time of the loss by fire of the insured property. There was no request to make other or additional findings of fact; and the only question open to the appellant on this appeal is whether, upon the facts found or which might have been found from the evidence in favor of the plaintiff, the conclusion of law was justified. *Carman v. Pultz*, 21 N. Y. 547; *Grant v. Morse*, 22 id. 323; *Meyer v. Amidon*, 45 id. 169. This consideration disposes of the principal question argued by the appellant's counsel in the brief submitted by him, viz.: that the consent of the defendant, after the title to the property vested in the plaintiff by the foreclosure, to continue the policy in force for his benefit, was inoperative, and did not bind the defendant, for the reason that it was given in ignorance of the forfeiture incurred by Tallen & Co., by their having procured additional insurance, without notice to the defendant and in violation of the terms of the policy. The fact that such additional insurance was procured is not found, nor is it in any way adverted to in the findings of the judge, and the rule is well settled that this court will not look into the evidence to see if any facts were proved, which, if found, would subvert the judgment.

The policy in question was issued upon the application of the plaintiff, and he paid the premium. He had at the time an interest as mortgagee in the insured property. The nature of his interest was stated to the defendant when the application was made, and the form of the policy was left to the judgment of the defendant's agent. It does not appear that the plaintiff was acting, in procuring the policy, as agent for or at the instance of Tallen & Co., the owners of the property. They were named in the policy as the persons insured, but the loss, if any, was by its terms payable to the plaintiff as his interest might appear, and his mortgage interest was much greater than the amount insured. The policy was delivered to him, and he retained it in his possession until after the fire.

The question arises, whether the parol consent of the company, after the title to the insured property vested in the plaintiff by the foreclosure, that the policy should continue in force for his benefit,

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confirmed it as a valid subsisting contract, notwithstanding the provision in the policy that upon a change of title to the property, by foreclosure or otherwise, the insurance should "immediately cease." I think that it cannot be held that the retention of the premium, paid on effecting the insurance, furnished a consideration for renewing and continuing the contract of insurance after it had been avoided by the act of the insured. The policy had attached, and the risk had been assumed by the defendant, liable to be terminated by the occurrence of certain events specified in the policy. If it was terminated pursuant to any condition in the policy, and without fault of the defendant, the whole premium was earned, and the insurer had a legal right to retain it, although the whole term fixed for the running of the policy had not elapsed. SHAW, Ch. J. *Felton v. Brooks*, 4 Cush. 207. It is not like the cases cited where the policy was void in its inception, and no risk had been incurred by the underwriter; nor is it the case of the modification of a contract, which at the time was mutually obligatory. *Fish v. Cottenet*, 44 N. Y. 538; *Shearman v. The Niagara Fire Ins. Co.*, 46 id. 526; 2 Phil. on Ins., § 1819. But clauses of forfeiture and avoidance are for the benefit of the party in whose favor they are made, and he may insist upon them or not, at his election. 2 Am. Lead. Cas. 306, and cases cited; *Clark v. Jones*, 1 Denio, 516. In many cases the party who could insist upon the forfeiture of a contract, and who could elect to abandon it, has an interest to waive the forfeiture, and treat the contract as subsisting, notwithstanding the failure of the other party. In this case, the defendant elected to continue the insurance in force for the benefit of the plaintiff, who had paid the premium, and for whose immediate benefit the policy was issued, and who was entitled to the insurance money in case of loss, and the company could not afterward, and after a loss had occurred, abandon its election, to the prejudice of the plaintiff. The plaintiff may have been, and upon the evidence it is probable that he was, prevented from procuring other insurance, relying upon the assurance of the defendant that the policy should remain in force. It was the natural result of the defendant's act, and I am of opinion that the case is within the reason upon which the doctrine of equitable estoppel is founded, and that the defendant is precluded from averring the want of consideration for the agreement to continue the policy, or from insisting upon the previous forfeiture. *Frost v. Saratoga*



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*Mut. Ins. Co.*, 5 Denio, 154, and cases cited; *Wolfe v. Security F. Ins. Co.*, 39 N. Y. 52; *Atlantic Ins. Co. v. Goodall*, 35 N. H. 328.

The proofs of loss were prepared in conformity with the direction of the defendant's agent and secretary, and were retained by the defendant; and under the circumstances the plaintiff was not bound to furnish additional proofs upon a general notice by the company, without specification of the points in respect to which they were deemed defective.

The judgment should be affirmed, with costs.

All concur.

*Judgment affirmed.*

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WOODS, plaintiff in error, v. PEOPLE

(55 N. Y. 512.)

*Rape — evidence of unchastity of complainant.*

Upon the trial of an indictment for rape, evidence of the unchastity of the complainant is competent upon the question of consent.

On a trial of W. for a rape upon M., *held* that evidence was admissible to show that M. was in the habit of receiving men at her dwelling for promiscuous intercourse. (*See note*, p. 811.)

INDICTMENT against Peter Woods for an alleged rape upon Mrs. Milleay. The opinion states the case. There was a verdict against the accused, and the judgment thereon was affirmed at general term. He then appealed to this court.

*William F. Kintsing*, for plaintiff in error. It was error to exclude the testimony offered by the prisoner that the prosecutrix was in the habit of receiving men in her rooms for the purpose of promiscuous intercourse. 1 Hale's P. C. 635; *People v. Jackson*, 3 Park Cr. 397; *People v. Morrison*, 1 id. 625; *People v. Woodin*, id. 16; *People v. Quin*, 50 Barb. 128; *People v. Abbott*, 19 Wend. 192; *Roscoe's Cr. Ev.* 708; 1 East, 444, 445; *Rex v. Barker*, 3 Carr. & P. 589; *Rex v. Martin*, 5 id. 562; 2 M. & R. 512.

*Benj. K. Phelps*, District Attorney, for defendants in error. Plaintiff's exception to the exclusion of evidence offered as to the

unchastity of Mrs. Milleay is unavailable on appeal, because the offer was not in the proper form. *Hosley v. Black*, 28 N. Y. 438, 444; 33 Barb. 336; *First Baptist Church v. Brooklyn Fire Insurance Co.*, 23 How. 468. Proof of the general reputation of the prosecutrix for chastity was not proper. 2 Bish. Cr. Pr. 965; *People v. Jackson*, 3 Park. Cr. 391, overruling *People v. Abbott*, 19 Wend. 192; Roscoe's Cr. Ev. 963, 978; 3 Greenlf. Ev. 214; 1 Phil. Ev. (7th Am. ed.) 176; 1 Russ. on Cr. 690; Chitty's C. L. 812; 1 Starkie on Ev. 700.

GROVER, J. Upon the trial the prisoner offered to prove by seven witnesses that the complainant was in the habit of receiving men there for the purpose of promiscuous intercourse, and for liquor especially. This evidence was objected to by the prosecution and rejected by the court, to which an exception was taken by the counsel for the prisoner. The evidence previously given shows that the place intended by the offer where she was in the habit of receiving men for the purpose specified was where she dwelt, known as "the Ranch," and that the liquor especially was intended to include the practice of the men so going there of taking liquor with them, of which the complainant partook to great excess during such visits.

Upon the assumption that the plaintiff in error had intercourse with the complainant, as to which the testimony was conflicting, the further issue was whether he ravished her by force, or whether she assented to such intercourse. Upon this issue all the authorities concur in holding that evidence showing that the character of the prosecutrix for chastity was bad is competent, and this, for the reason that it is more probable that an unchaste woman assented to such intercourse than one of strict virtue. The evidence is received upon this ground, and not for the purpose of impeaching the general credibility of the witness. Evidence showing that the prosecutrix has on a previous occasion had connection with the accused is competent, and this for the reason that having done this shows a probability that she did not resist but consented to that charged in the indictment. In *Rex v. Barker*, 14 English Common Law, 467, it was held that the prosecutrix might be asked, with a view to contradict her, whether she was not on a specified day after the alleged offense walking in High street, Oxford, looking out for men, and the further question,

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whether upon another specified day, after the alleged offense, she was not walking in High street with a woman reputed to be a common prostitute. This evidence was competent, not for the purpose of impeaching the general credibility of the witness, but proper for the consideration of the jury upon the question whether she assented to the intercourse with the prisoner. Under these authorities it is entirely clear that the evidence offered by the accused was competent. The number of witnesses by whom he proposed to prove the fact was immaterial. It was competent for him to prove, by any one knowing the fact, that the prosecutrix was in the habit of receiving men at her dwelling for promiscuous intercourse with them, and the weight of such testimony was in no respect impaired by the further fact that the men so received took liquor with them on these occasions, of which they and she partook to great excess. The testimony offered, if true, would have shown the complainant to be a common prostitute; proof more satisfactory than that of a bad general reputation for chastity. The trial court, as well as the general term, regarded the offer as nothing more than that of proof of some particular acts of lewdness. But it was much more. It was an offer to show by direct evidence not only this, but that the complainant was a common prostitute and in the habit of plying her vocation at the place where she dwelt. Whether evidence of particular acts of criminality by the prosecutrix is competent, is a question upon which the authorities differ, but one not necessary to determine in this case. In the *People v. Abbot*, 19 Wend. 192, such proof was held to be admissible. In the *People v. Jackson*, 3 Parker's Cr. 397, it was held incompetent. The authorities are all cited and ably examined in the opinions in these cases by COWEN, J., in the former, and by S. B. STRONG, J., in the latter. See also Roscoe's Crim. Ev. 810. When a determination of this question by this court shall be necessary to a disposition of the case before it, it will be considered and decided.

The judgment appealed from must be reversed and a new trial ordered.

All concur.

*Judgment reversed.*

NOTE. — On this question Wharton says (2 Crim. L., § 1151): "In England it was formerly held that the defendant might impeach the character of the prosecutrix for general chastity by general evidence but not by particular acts. *R. v. Clarke*, 2 Stark. 241. So far was this view pushed that it was held that the witness was not bound to say whether she had

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had connection with other men, or with a particular person named; and that evidence of her having had such connection was inadmissible. *R. v. Hodgson*, R. & R. 211. Since then, however, the witness was required to answer whether she had not had voluntary connection with the prisoner on a previous occasion. *R. v. Martin*, 6 C. & P. 562; though, upon her denying that she had previous connection with third persons, it is now settled evidence cannot be received to contradict her. *R. v. Cockcroft*, 10 Cox's C. C. 187; *R. v. Holmes*, 12 id. 187. So independent evidence is admissible to show that the prosecutrix had had a prior voluntary connection with the defendant. *R. v. Aspinwall*, 2 Stark. Ev. 700. It has even been held admissible to ask the prosecutrix whether *after* the alleged rape she had not been on the town. *R. v. Barker*, 3 C. & P. 589."

In Vermont a question to the prosecutrix whether she had not had connection with other men was held competent. *State v. Johnson*, 28 Vt. 512; *State v. Reed*, 29 id. 417. So in North Carolina, *State v. Murray*, 43 N. C. 31. But in Massachusetts, New Hampshire, Indiana, Missouri and Ohio the evidence is confined to general character. *Commonwealth v. Regan*, 105 Mass. 558; *McCombe v. State*, 8 Ohio St. 643; *Wilson v. State*, 16 Ind. 288; *State v. Foraker*, 48 N. H. 89; *State v. Knapp*, 45 Id. 146; *State v. White* 25 Mo. 300. — *Em.*

## PEOPLE ex rel. JUDSON v. THACHER, appellant.

(65 N. Y. 385.)

*Title to office — burden of proof.*

A certificate of election to an office is only *prima facie* evidence of title; and if the returns are shown to be false, the incumbent must establish his title by other proof, or submit to judgment of ouster.

In an action in the nature of a *quo warranto* against the incumbent of an office, brought in the name of the people on the relation of a candidate for an office who, according to the returns, received less votes than the defendant, *held* (1) that the returns having been shown to be false, the burden was on the defendant to establish his title to the office by other proof than his certificate of election; (2) that on failure to do this, judgment of ouster should be rendered against defendant; but (3) that the relator was bound to show affirmatively that he was entitled to the office in order to obtain judgment to that effect.

ACTION in the nature of a *quo warranto* by the People on relation of Edmund L. Judson against George H. Thacher, to try the title of defendant to the office of mayor of the city of Albany. By the official canvass and the returns of an election for mayor, held on the second Tuesday in April, 1872, it appeared that defendant received 6,588 votes, the relator 6,387 votes, and one McCarty 2,157 votes. Defendant received the certificate of election, and went into possession of the office. The plaintiff alleged frauds and irregularities in the southern district of the fourth ward. The

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remaining facts appear in the opinion. The judgment was in favor of defendant. The general term reversed the judgment and granted a new trial. Defendant appealed to this court.

*Matthew Hale* and *Samuel Hand*, for appellant. Mere irregularities in the conduct of an election or canvass, which do not affect the fairness or change the result, do not invalidate an election or return. *People v. Cook*, 4 Seld. 67; *People v. McManus*, 30 Barb. 620; *Ex parte Heath*, 3 Hill, 42. The best evidence as to how a man votes is the ballot itself. Parol proof to vary the return was improper. *People v. Saxton*, 22 N. Y. 309; 27 id. 81; *People v. Cicott*, 16 Mich. 284, 297, 313. In the absence of evidence of any outside interference with the ballots, a charge to the jury that nothing but a conviction that the inspectors were guilty of intentional fraud, was no ground of error. 11 Barb. 241; 12 Abb. 420. A request to charge may be refused without qualification, unless exactly and in terms correct. 6 Seld. 489; 3 Den. 594; 24 How. 172.

*Lyman Tremain* and *R. W. Peckham, Jr.*, for respondents. The inspectors' return was only *prima facie* evidence of the fact certified to. *People v. Cook*, 8 N. Y. 67, 82, 86, 93; *Mann v. Cassidy*, 1 Brews. 11, 48, 60, 61; *Thompson v. Ewing*, id. 67, 107, 109; *Weaver v. Givan*, id. 140, 157; *Thayer v. Greenbank*, id. 189, 208; *Myers v. Moffat*, id. 230. The returns should be rejected because the provisions of the statutes in relation thereto were not complied with. *Mann v. Cassidy*, 1 Brews. 48; Charter of Albany; § 5, tit. 5, chap. 77, Laws of 1870; 1 R. S. (5th ed.) 434, § 44; id. 435, §§ 46, 48, 50; id. 436, § 57; *People v. Cook*, 8 N. Y. 67. The perpetration of the fraud furnishes a presumption that it was done to alter the honest result and to elect defendant, and the return should have been wholly rejected. *People v. Cook*, 8 N. Y. 87; *Costigan v. Gould*, 5 Den. 290. The court erred in excluding proof that Haswell, the juror, had expressed an opinion in favor of Thacher. Whart. Am. Cr. L. (6th ed.), § 3012; 2 Dev. & Bat. 196. The exceptions and case having been made by plaintiffs, no exceptions taken by defendant can be inserted. *Blodgett v. U. & B. R. R. Co.*, 64 Barb. 580.

ANDREWS, J. The learned judge at the circuit, at the commencement of his charge to the jury, stated to them that the  
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plaintiffs were required to make out their case, and to prove that the defendant, Thacher, was not elected, and practically to show that the relator, Judson, was elected to the office of mayor, by having received the greatest number of votes at the election. It was an undisputed fact in the case that seven hundred and twenty-nine votes were cast for mayor in the southern district of the fourth ward, and evidence was given on the part of the plaintiffs tending to show that, of these, two hundred, or thereabouts, were cast for the relator, and one hundred and thirty-four for McCarty, the independent candidate. The defendant, Thacher, did not attempt on the trial to show the number of votes cast for him in that district, except by the return of the inspectors, and proof of the number of ballots on the table containing his name, counted by the inspectors. The plaintiffs attacked the return of the inspectors as false and fraudulent, and claimed that it should be rejected by the jury in considering the case. The judge, at the conclusion of his charge, was requested by the plaintiffs' counsel to charge the jury that if the return was rejected, and the jury should find that 729 votes for mayor were cast in that district, they could not presume, in the absence of proof, that the votes not proved to have been cast for the relator and McCarty were cast for the defendant, and that they could only allow to him such votes as the evidence in the case shows that he received. The judge refused to charge as requested. It is manifest from the charge made, and from the refusal of the judge to charge the proposition here adverted to, that the case was treated and regarded by him, with respect to the *onus probandi*, as an ordinary action, in which it was incumbent upon the people and the relator to show affirmatively the absence of title in the defendant to the office of mayor, before judgment of *ouster* could pass against him.

It is important, in dealing with the questions presented in the case, to determine whether the views stated by the learned judge, as to the burden of proof, is an accurate expression of law. The ancient writ of *quo warranto* was a writ of right for the king, against one who usurps any office, franchise or liberty, to inquire by what authority he supports his claim, in order to determine the right. 3 Bl. 262. In theory, the king was the fountain of honor, of office and of privilege. And, whenever a subject undertook to exercise a public office of franchise, he was, when called upon by the crown, through the writ of *quo war.*

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*ranto*, compelled to show his title, and, if he failed to do so, judgment passed against him. The foundation of the rule may have been that, as all offices and franchises are the gift of the king, they were deemed to be possessed by him, and, until his grant was shown, there could be no presumption that he had parted with them, or invested a subject with the right to exercise, by delegation, any part of the royal prerogative; but whatever may have been the origin of the rule, it was well established, and was applied also in cases where proceedings by information, in the nature of a *quo warranto*, were resorted to as a substitute for the writ. *Ree v. Leigh*, 4 Burr. 2143. In this State, the rule that, in proceedings by information to try the title to an office, the burden is upon the defendant to show his right, and that failing to do it, judgment must go against him, has been frequently recognized. *People v. The Utica Ins. Co.*, 15 Johns. 358; *People v. Thompson*, 21 Wend. 252; 23 id. 567, 589; *The People v. Pease*, 27 N. Y. 63; see, also, Kyd on Corp. 399; Cole on Quo Warranto, 221. The writ of *quo warranto* and proceedings by information in the nature of a *quo warranto* have been abolished (Code, § 428), and a remedy by action is given. The action may be brought by the attorney-general, in the name of the people, upon his own information, or upon the complaint of any private party, against a person who shall usurp, intrude into or unlawfully hold or exercise any public office; and the provision of the Revised Statutes (2 R. S. 582, § 35), which extend the scope of the original proceeding by *quo warranto*, and which allowed the attorney-general to set forth in his information the name of the person rightfully entitled to the office in controversy, with an averment of his right thereto, and authorized judgment to be rendered upon such right, as well as upon that of the defendant, has been preserved. Code, §§ 435, 436.

The forms of procedure have been changed, but the position of the defendant, and the rules of evidence, and the presumptions of law and fact are the same as in the proceeding by writ or information, for which the remedy by action was substituted. The people are here the ultimate source of the right to hold a public office; and now, as heretofore, when the right of a person exercising an office is challenged in a direct proceeding by the attorney-general, the defendant must establish his title, or judgment will be rendered against him. It results from these considerations that the defend-

ant, in order to have judgment in his favor, was required to prove that he was elected to the office of mayor at the election held in April, 1872. The possession of the office was not in this action evidence of his right. The burden was upon him to show by affirmative evidence that his possession was a legal and rightful one. But a failure on his part to prove his title to the office would not establish that of the relator. Upon the issue of the relator's title the plaintiffs held the affirmative, and the *onus probandi* was upon them to maintain it. Judgment in the action might have been rendered against the defendant, without adjudging that the title to the office was in the relator.

The defendant, Thacher, held the certificate of the city canvassers certifying to his election to the office of mayor by a plurality of votes cast at the election. This was produced and proved on the trial, and was *prima facie* evidence of his election. The certificate is made out from the returns of the inspectors of the several election districts. The returns are made by public officers charged with the duty of receiving and canvassing the votes in their respective districts, and the presumption which always exist in favor of the due performance of official duty makes the return and the certificate of the city canvassers evidence of the facts contained in them. But they are *prima facie* evidence only. It had been held in a series of cases in this State, before the case of *The People v. Pease*, 27 N. Y. 45, that the returns of election officers were open to inquiry and correction to the extent of allowing proof of clerical mistakes and omissions by the inspectors, and that defective ballots not allowed to the defeated candidate were intended for him. But the doctrine of the case of *The People v. Pease* was much more radical and comprehensive. Starting with the principle that the election, and not the return, is the foundation of the right to an elective office, it was held that it was competent, in an action to try the title, to go behind the ballot-box and purge the return by proof that votes were received and counted which were cast by persons not qualified to vote. In that case no fraud or misconduct was imputed to the inspectors. The disputed votes had been received by them in good faith. The right of the persons offering them to vote was not challenged at the time, and the return accurately stated the result of the election as shown by the count of the ballots actually deposited according to the forms of the law. The case is a strong illustration of the dis-



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position of the courts in this State, in election cases, to look through the formal evidence of the right to the right itself, and to set aside the return of election officers when necessary to promote the ends of justice. Freedom of inquiry in investigating the title to office tends to secure fairness in the conduct of elections, faithfulness and integrity on the part of returning officers, and it weakens the motive for fraud or violence by diminishing the chances that they may prove successful in effecting the objects for which they are usually employed.

The controversy in this case is brought down to the question of the vote in the southern district of the fourth ward. Excluding from consideration the vote of that district, the relator had in the other parts of the city a plurality of 146 votes. Including that vote as returned by the inspectors, the defendant Thatcher had in the city a plurality of 201 votes over those cast for the relator. The inspectors certify in their return that the whole number of votes cast for mayor was 652, of which the defendant received 460, the relator 113, and McCarthy 79. It was conceded on the trial that there were in fact 729 votes for mayor in the district, and the certificate, so far as it relates to the whole number of votes cast for that officer therein, is manifestly untrue. The mayor's box was the fourth one canvassed by the inspectors, and while the canvass of the other boxes was being made it was standing upon a low shelf, and was observed to be unlocked. There were several persons in the room beside the election officers. When the canvass of the vote for the other officers was completed, the inspectors took the box containing the ballots for mayor and placed them on the table, and while engaged in assorting them the light was suddenly extinguished. There was a short interval of entire darkness, and when light was procured the inspectors proceeded to count the ballots then on the table, and the results corresponded with the statement contained in their return. The discrepancy between the whole number of votes cast for mayor and the number certified by the inspectors in their return arises from the fact that the return was based upon the ballots counted, and not upon the number actually cast at the election. That the 77 missing ballots for mayor were fraudulently taken either from the box or table, does not upon the evidence admit of doubt. It is impossible to account for the discrepancy between the ballots cast and counted upon any other theory. The opportunity to commit the fraud existed. The box

containing the ballots had been left unlocked, and during the sudden and unexplained darkness, if not before, the fraud might have been accomplished. The testimony of witnesses denying participation in the fraud cannot overcome the weight and force of the conceded fact that 729 votes for mayor had been placed in the box, and that only 652 could be found therein, or upon the table, when the count was made. If the fraud committed was limited to an abstraction of the missing ballots, there would be no reason for rejecting the return. It would be incomplete in omitting to account for the full number of votes given for mayor, but it would relate, so far as any account was given of them, to votes actually cast by the electors. There is no proof that the fraud was committed by the inspectors or with their privity or consent, and the fact that these votes had been fraudulently taken from the box or table would not alone justify the inference that a further or different fraud had been committed, or that the votes remaining and which were counted were not the genuine ballots of the electors. The return is the primary evidence of the result of an election, and I assent to the general principle stated by the counsel for the defendant, that the return is to stand unless impeached, and is to be set aside or corrected only so far as it is shown to be erroneous. The proof that ballots had been fraudulently abstracted did not deprive the defendant of the benefit of the return, and, unless additional proof was given which would have authorized the jury to reject and disregard it, the defendant's title under the certificate of election was not overthrown; for, conceding the particular fraud in taking ballots from the box, the number of the remaining ballots cast for him, as shown by the returns, was sufficient to elect him. According to the return, he received in the southern district of the fourth ward 460 votes, and, after crediting the relator with his majority in the other parts of the city (146) and his vote in the southern district as counted (113) and the whole of the missing ballots (77), Thacher's plurality would be 124.

The greater part of the voluminous evidence given on the trial was directed to the question whether, in addition to the fraudulent abstraction of ballots, spurious votes had been placed in the box or upon the table, which were included in the count; and the rulings and charge of the court, as to the effect of this proof upon the return of the inspectors and upon the defendant's title, raise the

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principal question of law discussed upon the argument. Proof was given upon the part of the plaintiffs tending to show that 200 votes were cast for the relator in the district in question, and 134 votes for McCarthy, making an aggregate of 334, which exceeds by 142 votes the number returned for them by the inspectors. It was conceded by the judge on the trial that the evidence would have warranted the jury in finding that the relator and McCarthy together received 334 votes, and, for the purposes of this case, the fact must be deemed to have been established. As the whole number of votes cast at the election was 739, if all the ballots cast beyond the 334 had been given for the defendant, his vote could not have exceeded 392. The return, however, gives him 460 votes, which is 65 in excess of any number which could have been given him by the electors. It follows, therefore, that, among the ballots upon the table, there were at least 65 spurious votes, which were counted and returned as genuine by the inspectors. The proof on the part of the plaintiffs, if credited by the jury, rendered it certain that false ballots had been put into the box or upon the table, and that real ballots had been abstracted.

The judge, in his charge to the jury, instructed them that nothing but intentional fraud upon the part of the inspectors would justify them in entirely setting aside the return. The charge upon this point was, in my opinion, erroneous. The law prescribes the duties of returning officers, and the mode by which the results of elections shall be authenticated. But it regards the returns as presumptive evidence only of the facts contained in them. They may be impeached for error, and whether the error is that of the inspectors, or arises from the interference or illegal conduct or acts of third persons, is immaterial. The integrity of the returning officers is not necessarily involved in the inquiry as to the truth of the return. They may have been deceived and innocently induced to make a certificate false in fact. In this case there was proof of a double fraud; and when it appeared that ballots had been changed as well as abstracted, and that the count related as well to the substituted as the genuine ballots, the return was no longer entitled to be regarded. It was rendered wholly uncertain to what extent the fraudulent substitution had been carried, and it was not material whether the inspectors were privy to the fraud by which the uncertainty was occasioned.

It cannot be assumed that only 65 fraudulent votes had been

placed in the box or on the table. The extent of the fraud could only be ascertained by an inquiry as to the vote of all the electors who participated in this election. The fraud affirmatively proved rendered the return so uncertain and unreliable that it could not be used for any purpose, and its value as evidence was wholly destroyed.

It is urged by the counsel for the defendant that the evidence of voters who testified how they had voted ought not to have been received; on the ground that it was in contravention of the principle of the secret ballot. The secrecy of the ballot is said by DENIO, J., in *The People v. Pease*, to be an important and valuable safeguard of the humble citizen against the influence of wealth and station. There can be but little danger that a voter will be disturbed or hampered in the exercise of the suffrage by the consideration that in a judicial inquiry which may be prosecuted subsequent to the election to determine the title to office, he may be called upon to disclose for whom he had voted. The contingency that a disclosure may be necessary is so uncertain and remote that the contemplation of it cannot be supposed to influence the action of electors at the polls. The right to examine voters in an action in the nature of a *quo warranto* is in affirmance and vindication of the essential principle of the elective system, that the will of the majority of the qualified electors shall determine the right to an elective office. It is a sufficient answer in this case to the point suggested, that the testimony was given voluntarily and without objection to the trial.

We are also of opinion that the judge erred in refusing to charge the jury, in compliance with the request of the plaintiffs' counsel, heretofore referred to, that if the return was rejected the jury could not presume, in the absence of proof, that the votes in the southern district of the fourth ward, not proved to have been given for the relator or McCarthy, were cast for the defendant, and that they could only allow him such votes as the evidence in the case shows that he received. The request should have been granted. The ruling of the court in respect to it was in accordance with the view consistently adhered to by the judge throughout the trial, that the *onus probandi*, in respect to the defendant's title, was upon the plaintiffs. In this the learned judge was in error. The defendant's title was established in the first instance by the production of the return. If the return was rejected, then the defendant was

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bound to establish his title by other proof, and unless he did so the people were entitled to judgment against him. It could not be presumed, from the failure of the relator to account for the votes beyond the number proved to have been given for himself and McCarthy, that they were given for defendant. The failure to do so might prevent a recovery of the office by the relator, for the reason that all the remaining ballots may have been cast for the defendant, but it would not establish the defendant's title, for they may have been cast for the relator. The plaintiff's were not required, in order to defeat the defendant's title, to go further in the first instance with the proof of the fraud than to overcome the force of the return, and cast the burden upon the defendant of showing by other proof that he received a majority of the votes cast at the election. In election cases, if the return is discredited, so that it is no longer evidence of the right of the party claiming under it, then the question who received the majority of the votes is to be ascertained by other legal proof. The vote of the district or precinct to which the return relates is not to be disregarded. The electors ought not to be disfranchised because no return is made or because it has been rendered valueless by the fraud or mistakes of others. If no election had been held in the southern district of the fourth ward, or it had been held at a place not legally designated and distant from the place appointed by law, or if the polls were closed before the time, so that there was no fair opportunity for the electors to vote, another question would be presented. In this case, if the return was rejected, the parties were remitted to other proof to ascertain the result of the election in the disputed district. We are of opinion, for the reasons stated, that the order for a new trial was properly granted.

The defendant appealed to this court from the order granting a new trial. The right to appeal from such an order is given by section 11 of the Code ; but the section declares that such appeal shall not be " effectual for any purpose unless the notice of appeal contain the assent on the part of the appellant that if the order be affirmed, judgment absolute shall be rendered against the appellant." And the further direction is given that, if the Court of Appeals should determine that no error was committed in granting a new trial, " they shall render judgment absolute upon the right of the appellant." The notice of appeal contained an assent by the defendant in the language of the section. This is an action brought for a

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double purpose, viz.: to oust the defendant from the office of mayor and to establish the right of the relator to it. Final judgment against the appellant upon his right would not establish the relator's; and if final judgment should be given against the defendant, according to the stipulation, it would determine the action and deprive the relator of the opportunity to establish in the court below the right to a judgment in his favor. We are of opinion that the authority to appeal from an order granting a new trial does not apply to this case. The section contemplates cases where final judgment can be given which shall dispose of the entire question in controversy. If the defendant in a case like this can of right appeal from the order granting a new trial, it would be in his power to prevent a recovery by the relator upon his title, although the right to have his claim determined in the action is expressly given. The public is interested in the question litigated. There has been no verdict for the relator. The defendant cannot by his stipulation give to the relator a right to the office. The court cannot render the final judgment contemplated in section eleven.

The appeal must be dismissed on the ground that the case is not one in which an appeal from an order granting a new trial can be taken to this court.

All concur; CHURCH, Ch. J., concurring in result.

*Appeal dismissed.*

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**MARVIN, appellant and respondent, v. BREWSTER IRON MINING COMPANY.**

(55 N. Y. 538.)

*Mines — right of owner to work — reservation in deed — effect of non-user.*

The reservation in a deed of land of the minerals which may be found therein implies the right to penetrate the surface for the minerals, and to use such means in mining and removing them as are necessary; but the means used must be necessary as distinguished from convenient or reasonable, and the surface owner is entitled to subjacent support for the soil in its natural state.

In an action by the surface owner against the mine owner to restrain certain mining operations and to recover damages for alleged injuries to the surface owner: *Held*, that defendant's right to maintain a certain tramway, to

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erect on the surface and use a barn, powder-house and blacksmith shop, to sink and use, in a certain way, a steam-engine, to blast in the mine 'n the night-time, or at any time so as to shake or injure the dwelling of plaintiff and disturb his enjoyment, to deposit ore or refuse on the surface, was to be tested by the necessity therefor, as incidental to the right to mine and remove.

The non-user of a mine reserved in a deed of land will not of itself extinguish the right of the mine owner.

ACTION by Aaron B. Marvin against the Brewster Iron Mining Company to restrain defendant from carrying on its mining operation in plaintiff's lands situated in south-east Putnam county, and to recover damages for injuries alleged to have been occasioned thereby. The justice found the following facts: Frederick Parks in December, 1837, conveyed the lands in question to William Downs, the deed containing a reservation in the words: "Reserving always all mineral ores now thereon, now known, or that may hereafter be known, with the privilege of going to and from all beds of ore that may be hereafter worked on the most convenient route to and from." In October, 1838, Downs conveyed the lands to Gilbert Bailey by deed containing the clause: "Reserving always, however, all minerals in or on said premises." The title to the lands came into plaintiff's hands August 11, 1849, through several mesne conveyances, each containing the last-named reservation.

In October, 1855, Parks conveyed to one Paynton the mineral rights reserved, and the same rights were conveyed to defendant on January 15, 1858. From December, 1837, until January, 1864, there was no attempt to exercise the right of mining on the lands in question; but in the last-named month and year defendant commenced mining operations and the removal of ore, and has continued to do so. In the prosecution of these operations defendant caused the surface of the land to subside and fall in at certain places; it has deposited ore and rubbish from the mines upon plaintiff's premises, keeping such rubbish there for several years at a time and such ore several months at a time; has erected and maintained a blacksmith shop, powder-house and a stable for horses and mules, all for the purposes of the business. Defendant has carried on blasting with powder day and night by which plaintiff's dwelling-house and reservoir were shaken and injured; and the sleep and rest of plaintiff and his family have been disturbed at night by the noise of the blasting. Defendant has sunk a steam engine which

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has been used for the purposes of the mine, and the smoke and cinders from which, came up through the shaft and were driven against plaintiff's dwelling-house, rendering the occupation thereof uncomfortable. Defendant also erected a tramway several feet above the ground in front of and upon plaintiff's premises, and upon it conveyed coal-ore and refuse stuff.

The mine had been worked previous to 1837 and several excavations had been made, a portion of which the surface owner filled up in 1837 and 1838. Plaintiff had made improvements and filled up cuts or drifts which had not theretofore been filled. The justice found as conclusions of law that defendant owned the minerals and ores in plaintiff's land; that there had been no adverse possession nor any abandonment by non-user; that defendant had a right to enter upon plaintiff's premises and dig through the surface to procure the ore in the place and manner in which this was done; that defendant had a right to maintain a tramway at the place where it was built, but had no right to elevate it unless so high as to allow plaintiff's horses and carriages to pass under it. He also found that defendant had no right to deposit or keep upon the land of plaintiff ore or refuse stuff, or any barn, stable, blacksmith shop, powder-house or other building; that defendant had no right to blast in the night during the hours devoted to sleep by plaintiff and family, or so to blast, night or day, as to shake, crack or injure plaintiff's dwelling-house or other structures; that defendant had the right to use and sink a steam engine but not in the manner in which the one used was operated by defendant; and that defendant had no right to so work the mine as to deprive plaintiff's premises of the necessary support to prevent the surface falling in.

Damages were assessed at \$10,580.78; and other relief was granted in accordance with the above findings. Both parties appealed to the general term where the judgment was affirmed, but the amount of damages was reduced. Both parties appealed to this court.

*C. Frost*, for plaintiff. The right of access through plaintiff's premises to the mine is barred by adverse possession. *Arnold v. Stevens*, 24 Pick. 113; *Dennison v. Walker*, 11 Gray (Mass.), 423; *Harris v. Ryding*, 5 Mees. & Wels. (Exch.) 65; *Bell v. Wilson*, 35 L. J., N. S. (Ch.), part I, 327. If the rights claimed by defend-



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ant had been inserted in the reservation in plaintiff's deed, they would have been held repugnant to the grant and void. *Shep. Touch.* 79, 89, 100; *Hilton v. Ld. Granville*, 5 Q. B. 701; *Humphries v. Brogden*, 12 id. 745, 754; *Blackett v. Bradley*, 1 B. & S. (Q. B.) 940; *Harris v. Ryding*, 3 Mees. & Wels. 60; *Smart v. Morton*, 5 El. & B. 30. Defendant had no right to injure plaintiff's building because not erected within twenty years. *Stroyan v. Knowles*, 6 Hurl. & Norm. (Exch.) 454; *Brown v. Robbins*, 4 id. 186; *Humphries v. Brogden*, 12 Q. B. 745, 754; *Hays v. Cohoes Co.*, 2 Comst. 519. Defendant had no right to blast in the night, during the usual hours of sleep, so as to disturb plaintiff and his family. *Fish v. Dodge*, 4 Den. 321; *McKeon v. See*, 4 Robt. 449. Defendant had no right to deposit ore or refuse upon plaintiff's land, or to cause any erections to be made thereon. *Earl of Glasgow v. Hurlot Alum Co.*, 3 H. of L. Cas. 25, 47; *Shep. Touch.* 100; *Ives v. Van Auken*, 34 Barb. 566; *Hoffman v. Astina Ins. Co.*, 32 N. Y. 405; *N. J. Zinc Co. v. N. J. Franklinite Co.*, 2 Beas. (N. J.) 322, cited in 23 U. S. Dig. 166, 173; *Dand v. Kingscote*, 6 Mees. & Wels. 173; *Bishop v. North*, 11 id. 418; *Rogers v. Taylor*, 1 Hurl. & Norm. (Exch.) 705; *Earl of Cardigan v. Armitage*, 2 B. & C. 197; *Bell v. Wilson*, L. J. (Ch.), vol. 35, pt. I, p. 337; *Humphries v. Brogden*, 12 Q. B. 754; *Robotham v. Wilson*, 6 El. & B. 592; *Richerts v. Haines*, id. 643; *Harris v. Ryding*, 5 Mees. & Wels. 59, 70; *Hext v. Gill*, 7 L. R. (Ch. App.) 700, 718; S. C., L. J., 1872 (N. S.), vol. 41, pt. 1, p. 761. Plaintiff was entitled to damages to the time of trial. *Worrall v. Munn*, 38 N. Y. 137. Plaintiff was entitled to damages sustained by defendant's blasting under his house in the night-time. *Hubbell v. Meigs*, 50 N. Y. 480.

*Jno. E. Parsons*, for defendant. Defendant is entitled to do all that is necessary toward the convenient working of its mines, taking reasonable care to avoid injury to the property and rights of others. *Col. Law of Mines*, 58; 77 *Law L.*; *Shep. Touch.* 100; *Dand v. Kingscote*, 6 Mees. & Wels. 164; *Ewart v. Cochrane*, 4 Macq. H. of L. 117; *Earl of Cardigan v. Armitage*, K. B. (2 B. & C.) 197; *Rogers v. Taylor*, 1 Hurl. & Norm. 706; *Elliot v. N. E. R. Co.*, 10 H. of L. 333; *Turner v. Reynolds*, 23 Penn. 199; *Bardwell v. Ames*, 22 Pick. 333, 388; *Clark v. Duval*, 15 Cal. 85, 88. Because the reservation with the right to the minerals expressed also the privilege of going to and from the mine, other privileges were not

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excluded. *Dand v Kingscote*, 6 Mees. & Wels. 164; *Wyrley Canal Co. v. Bradley*, 7 East, 368 (K. B. 1806). Plaintiff cannot, by erection upon the surface of the land, enlarge defendant's obligation *Hilton v. Whitehead*, 12 Ad. & El. (N. S.) 734 (Q. B. 1848); *Smart v. Morton*, 30 E. L. & Eq. 385 (Q. B. 1855); *Brown v. Robbins*, 4 H. & N. 146 (Exch. 1859); *Taylor v. Shaft*, 8 B. & S. (Exch. 1867); *Wakefield v. Duke of Buccleuch*, 4 L. R. (Exch.) 613; *Cal. R. Co. v. Sprot*, 2 Macq. H. of L. 449; *Thurston v. Hancock*, 12 Mass. 220; approved, *Panton v. Holland*, 17 Johns. 192; *Lasala v. Holbrook*, 4 Paige, 169, 172; *Farrand v. Marshall*, 21 Barb. 409. A person who puts an additional burden upon his own land is not entitled to adjacent support. 2 Rolle's Abr., Trespass, pl. 1; *Wyatt v. Harrison*, 3 B. & A. 871 (K. B. 1832); *Peyton v. Mayor of London*, 9 B. & C. 725; *Dodd v. Holmes*, 1 Add. & El. 493; *Partridge v. Scott*, 3 M. & W. 320; *Chadwick v. Brown*, 6 Bing. N. C. 1. No title to such property as mines can be claimed by prescription. Rolle's Abr., Prescription (B.); *Wilkinson v. Proud*, 11 M. & W. 33; *Caldwell v. Copeland*, 37 Penn. 427; *Smith v. Lloyd*, 11 M., W. & G. 562.

FOIGER, J. The ultimate principles upon which the decision of this case should rest are not undetermined nor obscure. The relative rights and duties of owners of superjacent lands, and of subjacent minerals, have been much discussed and passed upon. Then, too, the position of adjacent owners of land is an analogous one, and the rules which have been laid down as to them, and often enforced, throw light upon the questions arising here. But at last it will be found that in this action the findings of fact of the trial court, as is often the case, control in the main the decision of the appellate court.

Of important results in this case, are the rules, that this court is bound to take the facts as they are stated in the case to have been found by the judge or referee, and to compare the judgment with those statements of the fact. *Farnham v. Hotchkiss*, 2 Keyes, 9; that, in the absence of express findings of fact to sustain the judgment, it may look into the testimony, and, if there be evidence which will support the conclusions of law, it may infer that there was a finding of fact by the judge or referee, though not expressed, *Newman v. Frost*, 52 N. Y. 422; but that, if there is any evidence upon which the judgment may rest, this court may not look into the

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testimony to determine whether there is preponderating evidence to the contrary; nor, where there is any contrariety of testimony, to determine whether it was correct to refuse to find a fact as requested. *Chamberlain v. Prior*, 2 Keyes, 539.

The whole estate was at first in Parks. He severed it by his conveyance to Downs. He transferred to Downs and his grantees only the surface land. It is said that such a transfer is of the surface, and of all profit which can be got from cultivating it, or building upon it, or using it; that thus much is intended to be conveyed. *Hext v. Gill*, Law Rep., 7 Chy. App. 700. But as in the same conveyance there is a reserve to the grantor of an important part of the general estate, and of important incidents thereto, it is manifest that if the reserve is effectual and still operative, there is imposed upon the estate conveyed a serious servitude; though it, in its turn, becomes to a certain extent dominant over the estate reserved. The remark in *Hext v. Gill*, *supra*, has a limit then, and that which Parks can be reasonably considered to have granted, is the surface land, and such measure of support subjacent, as was necessary for the surface land, in its condition at the time of the grant, or in the estate, for the purpose of putting it into which, the grant was made. *Cal. R. W. Co. v. Sprot*, 2 Macq. Scotch App. Cases (H. of L.), 451. The plaintiff, then, as the grantee by *mesne* conveyances from Downs, is the owner of the surface, with all these rights of use and profits of it, subject to such limitations as result from the servitude which his estate is under.

There is a clause in the deed from Parks to Downs, "Reserving always all mineral ores, now known or that may hereafter be known, with the privilege of going to and from all beds of ore that may be hereafter worked, on the most convenient route to and from." The learned justice has found that this is a reservation of all ore on the premises. It is also of a privilege of way upon the premises. There need to be no difficulty, whether what is claimed to have been retained in Parks by this clause is technically the subject of an exception or of a reservation, or in part of one and in part of the other. *Craig v. Wells*, 11 N. Y. 315. There is no doubt of the intention of the parties to the conveyance. It was to keep in Parks and his future assigns, unconveyed to Downs and his assigns, all that which the meaning of the clause, had it been framed with strictest technicality, would have saved from the operation of the granting part of the deed. *Provost v. Calder*, 2

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Wend. 517; *Bridger v. Pierson*, 45 N. Y. 601; *Whitaker v. Brown*, 4<sup>th</sup> Penn. St. 197.

A reserve of minerals and mining rights is construed as is an actual grant thereof. It differs not, whether the right to mine is by an exception from a deed of the surface, or by a grant of the mine by the owner of the whole estate, therein reserving to himself the surface. *Shep. Touch.* 100; *Dand v. Kingscote*, 6 M. & W. 174; *Williams v. Bagnall*, 15 Week. R., 272; see *Wickham v. Hawker*, 7 M. & W. 78; and comment thereon in *Proud v. Bates*, 37 L. J. (Chanc.) 406; S. C., 5 Am. Law Reg. (N. S.) 171-174. A reservation of mineral and mining rights from a grant of the estate, followed by a grant to another of all that which was first reserved, vests in the second grantee an estate as broad as if the entire estate had been granted to him, with a reservation of the surface. *Arnold v. Stevens*, 24 Pick. 106. Though a reservation is to be construed most strictly against the grantor, still there will be retained in him all that it was the clear meaning and intention of the parties to reserve from the conveyance. *Harris v. Ryding*, 5 M. & W. 60; per PARKE, B., p. 70. These observations are made necessary, by positions taken and urged on the argument by the learned counsel for the plaintiff. And here is a fit place to notice, that *Hilton v. Ld. Granville*, 5 Q. B. (48 E. C. L. R.) 701, much relied upon by him, in that it held that there cannot be reserved in a grant that which will deprive the grantee of the enjoyment of the whole thing granted, and that a clause to that effect must be rejected as absurd and repugnant, has in that respect been from time to time much questioned, and finally in effect overruled. *Rowbotham v. Wilson*, 8 H. of L. Cas. 348; *Duke of B. v. Wakefield*, L. R., 4 H. of L. 377; and see *Hext v. Gill*, *supra*.

The deed from Parks to Payntar, and that from Payntar to the defendant vest in it, then, all the estate which Parks did not convey to Downs, and all the rights incident thereto; and this estate and these rights are as great, as if he had made his deed to Payntar in the terms of the reservation in that to Downs, while he (Parks) owned the whole estate unsevered. It is an old rule that, when any thing is granted, all the means of attaining it, and all the fruits and effects of it are also granted. *Shep. Touch.* 89, 100; *Bacon Ab., Grants* (I) 4. This rule we have in more than one instance, of late, been called upon to apply in behalf of the grantee.

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In *Comstock v. Johnson*, 46 N. Y. 615, it is stated so largely as this : "Every thing necessary for the full and free enjoyment of the mill passed as an incident appurtenant to the land conveyed." See also *Voorhees v. Burchard*, decided November, 1873. These were cases of mill sites conveyed ; for the enjoyment whereof there was necessary an easement over and upon intervening lands of the grantors. A grant of minerals, *in situ*, reserving the surface, is not different. It is like, too, the grant of a close, within other lands of the grantor ; or of an upper story of a house, the grantor still owning the lower. There the grantee has a right of way to his close, or to his upper story, through the premises of the grantor. *Pomfret v. Ricroft*, 1 Will. Saun. 321, note 6. It is the same if the owner grants the surrounding lands and reserves to himself the close. *Id.* Hence a grant of minerals in the land gives a right to mine for them, unless there is a positive restriction in the grant itself.

The plaintiff claims that this general power, if thus acquired as an incident to a grant, is limited by a special power or privilege, particularly mentioned in the grant or reservation. And as the reservation here does, in particular terms, stipulate for a privilege of going to and fro, he insists that this privilege is all that the defendant has. Such is not the effect of such a particular. *Earl Cardigan v. Armitage*, 2 B. & C. 197 ; *Green v. Putnam*, 8 Cush. 21. The right to work a mine, reserved by the grantor of the surface, carries with it the right to penetrate to the minerals through the surface of the land conveyed, for the purpose of digging them out and removing them. *Gould v. G. W. D. C. Co.*, 29 Johns. P. 820 ; S. C., 12 L. T. 842 ; 13 *id.* 109 ; *Rogers v. Taylor*, 1 H. & N. 706 ; *Hext v. Gill*, *supra*. This being so, there must be included in the right to break through the surface, the right to do so in such manner as is most advantageous to the owner of the right to mine, so that the surface is not wholly destroyed. By this is meant, that he has a right to sink a shaft vertically, or to drive a way horizontally, or to do both in different places, so that he may reach the minerals and take them out from below the superjacent earth, following the veins of ore with excavations below the surface ; always, however, under the restriction that what he does it is necessary for him to do for the reasonable use and enjoyment of his property in the minerals. We are aware that in *Harri v. Ryding*, *supra*, Lord ABINGER, C. B., is reported as saying to the effect, that a reservation of mines and minerals gave no

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right to sink shafts or drive cuts upon the surface of the land from which the reservation was made. He is the only judge who there made such utterance. It was not upon a point involved in the case; it was made argumentatively. It is opposed to the general rule to be derived from other decisions. That case turned wholly upon the point, in which all the judges agreed, that miners were bound to leave reasonable support for the surface. True, BAYLY, J., in *Cardigan v. Armitage*, *supra*, says the incidental power "would allow no use of the surface." It is plain, from the current of the reasoning, that he meant use of the surface as surface, in its unbroken state; for he was then reasoning toward the conclusion, which he finally reached, that a reservation of coal below the surface, reserved also, as an incidental right, the power of reaching them through the same surface. And in the same case, HOLROYD, J., suggesting to counsel, *arguendo*, said: "If the coal itself had been excepted, without more, that would have been a right of entry forever." And see *Hodgson v. Field*, 7 East, 613.

The necessity which is to govern is not fixed and unvarying. The right may be exercised in a manner suitable to the business to be carried on. Such is the principle of the decision in the analogous case of *Gayford v. Moffatt*, Law Rep., 4 Ch. App. 133, where it is held that a lessee of an inner close becomes entitled to the right of way through an outer close, and that the way afforded to him must be suitable to the business to be carried on by him on the premises demised. And what is perhaps but an expansion of the last proposition, the exercise of the right is not to be confined to the modes in vogue when it was first acquired. The owner of the mine may keep pace with the progress of invention and ingenuity, so far as is necessary to a profitable working of his property in competition with rivals. Hence, he may adopt new and improved methods, which are usually availed of in the same business, when the use of them is necessary to him. This rule is drawn from the decision in *Dand v. Kingscote*, *supra*, where it was held that, under a right to a sufficient way-leave, ancient or origin, the coal-owner was not confined to such ways as were in use at the time of the grant; and that under a liberty to sink pits, of like early origin, the right of erecting a steam engine and other machinery for draining the pit, with all proper accessories, passed as incidental thereto. The right there adjudicated upon, it is true, arose from the express terms of the reservation; but if the right originally

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exists, it is conceived that it matters not whether it is from the express terms of the instrument or as an incident to a general power reserved, and that, in the one case as well as the other, it may be exercised after modern methods. And see *Dyce v. Hay*, 1 Macq. H. of L. Cases, 305-312; *Senhouse v. Christian*, 1 T. R. 560.

It is to be borne in mind all the while, that the rights which follow ownership as incident thereto are no more nor greater than those which are necessary for the beneficial enjoyment of the property. It may be convenient to have other rights, less difficult or less expensive with them, to carry on the operations, but this is not the test. The learned counsel for the defendant insists that the measure of the use which it may make of the plaintiff's land is not the most rigid necessity, but a reasonable convenience. It is said by Lord MANSFIELD, in *Morris v. Edgington*, 3 Taunton, 31: "It would not be a great stretch to call that a necessary way, without which the most *convenient and reasonable* mode of enjoying the premises could not be had." We do not think that this is sustained to that extent by later decisions; and see comments upon the case in *Barlow v. Rhodes*, 1 Crompt. & Meeson, 439. In *Lawton v. Rivers*, 2 McCord, 445, it is remarked: "An inconvenience may be so great as to amount to that kind of necessity which the law requires." In *Pettingill v. Porter*, 8 Allen, 1, it is held "that there is a way by necessity, where another cannot be got or made without unreasonable labor and expense; and that, in determining the question, the jury may consider the comparative value of the land and the probable cost of such ways, and the word 'necessary' cannot be limited to absolute physical necessity." But yet the way must be necessary, and the facts of each case must determine whether it or any other easement thus claimed is necessary. It must be more than one of mere convenience (*Screeven v. Gregoria*, 8 Rich. 158), or one beneficial and convenient (8 Allen, *supra*), and is only commensurate with the existence of the necessity upon which the implied grant of it is founded, and ceases when the necessity for it ceases. *N. Y. Life Ins. & T. Co. v. Milnor*, 1 Barb. Ch. 353.

The defendant may not claim, as incident to the grant to it, that which is convenient. It may have only that which is necessary, but may have that in a convenient way. One may have a way by necessity over the land of another; and having it thus, he may have it at a place and route which is convenient for him. But

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he never can have it because it is convenient for him, unless it is first necessary. The right arises from the necessity of the case, and not otherwise. It will be seen, when we come to consider the findings of fact and refusals, that this is of much importance. It is very rarely, then, that a case arises where, upon this test, the mine owner can justify the use of the surface for the lengthened keeping of his ore. Still more rarely, for the long-continued deposit of the rubbish from the mine, or for the erection of buildings for the storage of materials, the housing of animals or the use of artisans. So says BAYLY, J., in 2 Barn. & Cress., *supra*: "The incidental power would warrant nothing beyond what was strictly necessary for the convenient working of the coals. It would allow no use of the surface, no deposit upon it to a greater extent or for a longer duration than should be necessary, no attendance upon the land of unnecessary persons. It would be questionable at least whether it would authorize a deposit upon the land for the purposes of sale, and whether it would justify the introduction of purchasers to view the coals." See *Kaler v. Beaman*, 49 Me. 207; *Turner v. Reynolds*, 23 Penn. St. 199, cited by the defendant, seems adverse to this. But the language of the opinion is to be read in connection with the lease there, which was of the land as well as of the mine. It must be seldom that, after the ore is separated and haled out, that there exists a necessity for the use of the land in which it is found. It, and the rubbish found with it, may ordinarily be carried from the land on to the other possession of the owner of the mineral. It is ordinarily practicable for the owner, to obtain possession of land near enough for storage and dumping-ground, and for sites for all buildings requisite for the purposes above named. It is seldom that considerations of vital economy create the necessity which the law recognizes. "Reasonable profit," in the phrase of PARKE, B., in *Dand v. Kingscote*, *supra*, is all that the mine owner can insist is within the beneficial enjoyment of his property. The defendant cites *Rogers v. Taylor*, 1 H. & N. 706, which does, indeed, go farther than this, and does sustain the heaping up of rubbish upon the surface lands. That, however, was a decision upon demurrer, where a plea was held good which set up a like user of over twenty years, and the court held that the right was not unreasonable and might have originated in grant; in express grant, we understand to be meant, to do the very kind of act complained of. See *Carlyon v. Lovering*,



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40 Eng. Law & Eq. 448. These authorities are not applicable here.

We have considered the case so far, upon the incidental powers arising from the reservation of the right of property in the minerals. The privilege further reserved in the deed to Downs, and subsequently granted to defendant, of going to and from all beds of ore that might be thereafter worked on the most convenient route to and from, we have shown does not in any wise limit these incidental powers. On the contrary, it is plain that it aids them. It is not a right of way only over the surface; it is to all beds of ore thereafter worked. Of necessity, to reach beds below the surface, the way must go through the surface; not merely on a necessary or a convenient route, but, as the terms of the privilege are, on the most convenient route; hence by shaft or tunnel, or both, as shall give the readiest or the cheapest access, and also across the surface to the mouth of the tunnel or shaft.

The plaintiff insists, however, that, whatever may have been the rights which were retained by Parks from his conveyance to Downs, they were intercepted, and extinguished and transferred, and did not reach the defendant. He sets up an adverse possession. He bases it upon the affirmative acts of Downs and his grantees, and upon the neglects and omissions of Parks and his grantees of the minerals. This claim of an adverse possession cannot rest merely upon a non-user by the grantors of the defendant. The rights now claimed by them were the subject of an express grant. In such case, though there be no non-user, if there has been no act of the owners of the surface lands which prevented the exercise of the rights of mining, they still exist. *Smiles v. Hastings*, 24 Barb. 44; *Armstrong v. Caldwell*, 53 Penn. St. 284; and see *Smith v. Lloyd*, 9 Exch. 562. Nor can it rest upon any act of the owners of the surface which appears in the case. To work such effect, the act must be hostile and adverse to the rights of the owner of the minerals. That cannot be predicted of the acts displayed in the findings or in the proof. Not an instance is given of any assumption of control over the ore by digging it, or by preventing, interfering with or forbidding an attempt to dig it. The only acts shown are those of Downs and others, in filling up, at times, and in places, the old cut to the vein, in changing, in places, the course of the old cart-way, and putting fences across with bars and openings therein. These were not accompanied with any claim of sole and

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exclusive right to the entire estate, nor to the way over it. They were not done in avowed hostility and resistance of a claim of right by the grantors of defendant. They were not acts which were, of themselves, of necessity and natural results, hostile to other rights and exclusive of them. All that can be said of them is, that the owners of the surface lands had the use and enjoyment of them, and of the ways over them, but after such sort as was entirely consistent with the existence of a right of the owners of the minerals, to use and enjoy them, and "of way" to them. In fine, there is nothing shown but the suspension on the one side of the exercise of the right to mine, and on the other of acts, during such suspension, entirely consistent with the existence of such right, though suspended in its use. And this applies to all other rights reserved, as well as to the ownership of the minerals and the right to mine for them. For a discussion of this topic, so full as to forestall further elaboration here, see *Arnold v. Stevens*, *supra*.

There is one fact in this case not considered there, and which is urged by the plaintiff. The deeds from Downs and his grantees, down to that to the plaintiff, do not contain the clause of reservation which is in the deed from Parks to Downs. Such omission does not affect the conclusion we arrive at, as is held in *Seaman v. Vawdrey*, 16 Vesey, 390.

The plaintiff acquired, as a right of property, that there should be left of the minerals, in their place under the land, sufficient to support the surface in its natural state. This was the extent of his right to subjacent support, there being no building upon the land when Parks conveyed to Downs, nor the erection of any one of the purposes in their contemplation. *Cal. R. W. Co. v. Sprot*, *supra*. The defendant lays great stress upon the small consideration given for the land. The right to support is without regard to the comparative value of the strata. *Humphries v. Brogden*, 12 Q. B. 739. This right to sufficient subjacent support is likened, sometimes, to that to have lateral support to land. In that case, all which can be claimed is, that the adjacent owner shall not so dig upon his land as that that of his neighbor shall fall into his pit. If the weight of buildings, of late erected by his neighbor on the land, cause it to slide, when of its own weight it would not, there is no claim for redress. *Lasala v. Holbrook*, 4 Paige, 169. Is it not the same rule, that whatever an adjacent owner can do upon or in his own land, confined within that, and

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necessary for the convenient and beneficial enjoyment of it, which works no physical injury to his neighbor's possession in its natural state, he may do without liability to his neighbor, although it may work physical injury to a building lately erected thereon by his neighbor? For in *Humphries v. Brogden*, *supra*, the reason is given that an owner cannot, by putting an additional weight upon his own land, and so increasing the lateral pressure upon his neighbor's land, render unlawful any operation thereon which before would have caused no damage. Is this exemption from liability confined to a case of lateral pressure? If he may so dig as that the building shall topple down, and not be liable so long as that, but for the building, the earth would not have fallen in, may he not so blast in digging as that the building shall shake, crack and crumble, without giving cause of action, so long as that the surface of his neighbor's ground is not injured or disturbed, though it be shaken? He is not bound to support the building, so long as he affords a support sufficient for the soil without the building. He is not bound to refrain from digging in his own land, so soon as he comes near the limit of support for his neighbor's building, not an ancient one. He is not bound to be circumspect in his means of digging, so long as they do not affect badly his neighbor's land. Is he bound to refrain from the use of the means which do not injure his neighbor's land, for that they badly affect a modern house thereon? In our judgment he is not. See *Smith v. Thackerah*, Law Rep., 1 C. P. 564. Whatever it is necessary for him to do for the profitable and beneficial enjoyment of his own possession, and which he may do with no ill effect to the adjacent surface in its natural state, that he may do, though it harm erections lately put thereon. As the rights and relations of adjacent owners and those of superjacent and subjacent owners are alike, so may the subjacent owner do beneath the surface what the adjacent owner may do beside it. And where, as in *Harris v. Ryding*, *supra*, learned judges speak of the subjacent owner not being entitled to let down the surface or injure the enjoyment of it, they mean the surface in its natural state, and not with additions to it in buildings not ancient. And see *Partridge v. Scott*, 3 M. & W. 220.

Nor do these rights (for a time and to a degree to impair the surface, and so that support be left sufficient for it in its natural state, to leave it insufficient to support buildings not ancient) require or depend upon a covenant to make compensation, as

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is urged by the plaintiff. It is true that many reservations of such rights are accompanied with a covenant to compensate. The covenant does not create or add to the reservation. The privileges are created, fixed and defined by the terms of the reservation alone. If there be a reservation without a covenant, the rights it creates or retains are just as valid and maintainable.

Nor does this case fall, in its main aspects at least, within the rule recognized and applied in *Hay v. Cohoes Co.*, 2 N. Y. 159. There the adjacent owner, though following a lawful purpose upon his own land, in excavating a canal thereon, cast rocks from it upon his neighbor's land. He immediately and physically invaded his neighbor's exclusive possession. He had the right to dig the canal. His neighbor had the right of undisturbed possession of his property. It was held, on grounds of public policy, better, if these rights conflicted, that he should give up the right of a particular use, than that his neighbor should lose the beneficial use of his altogether. Here, however, the case, if not reversed, is nearly so. The sole use which the defendant can make of its property is to excavate and remove it. If it is doing only what is necessary to that end, shall it give up altogether the sole beneficial use of its property, that the plaintiff may use his undisturbedly in one way, the most profitable, doubtless, and the most desirable, but still one way of several?

And so the argument brought by the plaintiff, from the analogy of those decisions, which hold that one may not so use his property as to make a nuisance to his neighbor. There can be no rightful complaint thereof by one who has agreed that such use may be made. The reciprocal rights and obligations of these parties, in this regard, come down from the contract between Parks and Downs, to which they are privies. Parks reserved the right to himself and to the defendant to do all things necessary to get at, and get out, this mineral; and Downs, for himself and for this plaintiff, in consideration of the sale and conveyance of the surface of this estate at the price bargained for, agreed that all necessary things might be done. One may not establish a right to make a public or a private nuisance by prescription, which is the presumption of a grant. *Mills v. Hall*, 1 Denio, 315. But where there has been an express grant of a right to do all things necessary to attain an end, and such nuisance results as a necessary incident thereto, there can be no claim for private damage from the doing thereof.

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The point made by the plaintiff on his printed brief, that it was but the limited right of certain persons to mine which was reserved by Parks, is not sustained by the proofs. The folios to which he refers have been stricken out of the appeal book; it seems by stipulation.

The plaintiff also invokes the doctrine of estoppel, and insists that the defendant, having reposed upon its rights, if any it had, until the plaintiff had changed his condition by large expenditures upon his property, may not now, with good faith toward him, insist upon those rights to his detriment. There is no estoppel in the case. It does not appear that the silence or inaction of the defendant misled the plaintiff, or that he at all relied thereupon in his making his primary investment in the premises, or his subsequent expenditure in their improvement.

Having thus given our views of the legal questions involved in the case, it remains to determine the result of their application to the facts. The plaintiff appeals from so much of the judgments below (upon the questions other than his damages) as are based upon the conclusions of law of the learned justice at special term, expressed as follows: First, that the defendant owns all mines, minerals and ores upon the plaintiff's lands described in the complaint. Second, that there has been no adverse possession thereof. Third, that it has a right to enter upon plaintiff's premises and to dig through the surface in order to procure such ores. Fourth, and so to do at the place and in the manner in which it has opened and dug their drift-way in front of plaintiff's bank wall. Fifth, that there has been no adverse possession sufficient to defeat this right. Sixth, that the defendant has a right to maintain a rail or tramway at the place where the same has been built on the plaintiff's premises, for the purpose of working such mine. Seventh, and that the defendant has a right to use and sink a steam-engine on the premises of the plaintiff for the purpose of working said mines.

In our judgment the learned justice was correct in arriving at these conclusions. The first, second, third and fifth have been shown to be correct, directly, in the foregoing discussion. The fourth, sixth and seventh depend entirely upon the fact of whether the acts therein mentioned were necessary for the profitable and beneficial enjoyment of the property of the defendant in the minerals. The learned justice has not in terms found as matter of

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fact that the use in these particulars was thus necessary. And although he has refused to find that all of the use made by the defendant of the plaintiff's ground has been necessary in carrying on the operations of the mine, he has not found, nor has he refused to find, that the use in the particulars comprehended in the above conclusions of law, was not necessary for some lawful purpose of the defendant. So that we are enabled to look into the evidence, and to make inferences therefrom in support of the conclusions of law and the judgment arrived at by him. We find that there is enough in the testimony to sustain a finding of fact, that the use of the plaintiff's land was in these particulars thus necessary. We so infer.

The defendant appeals from the judgment, and has excepted to some of the conclusions of fact. We think that the conclusions thus excepted to are immaterial to the questions now in contention, or are sustained by some of the testimony given. The learned justice does, indeed, find that the defendant has caused the plaintiff's land to subside and fall in. We find no testimony of such subsidence, save at the tunneling following the old drift-way. And so the finding, made on the request, limits it. The subsidence there is not of the land of the plaintiff, except that which was made by the filling in of the old drift. The learned justice found no damages to have resulted from that subsidence. In that respect, the finding of fact is not material. He does find, as a conclusion of law, that the defendant has no right so to work the mine as to deprive the plaintiff's premises of the necessary support to prevent the surface from falling in. As an abstract proposition, this is correct. He does adjudge that they be restrained from removing the subjacent support from the plaintiff's premises, so as to cause any portion thereof to subside or fall in. This looks to the future. It does not apply, nor does it seem to be meant to apply to the falling in on the route of the old cut. And, so understood, there is no error in so adjudging. Nor does it seem material to any question really mooted upon this argument. At any rate, as a restraint in the future from doing what it should not do, it cannot harm the defendant. We, therefore, regard the finding of fact, in this particular, as immaterial.

The learned justice found that the blasting was not conducted with the care usual in such cases. The testimony on which to sustain this is not very great. It is true that the effects of the blast-

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ing upon the house and reservoir of the plaintiff have been marked ; and it is true that it is in the testimony, that it is not usual for the blasts to produce such effects, so that it may be said consequentially that the blasts have not been such or so conducted as is usual. Yet it is also in the testimony that the house of the plaintiff is peculiarly founded ; on the solid rock, some feet below the surface. The effect upon it may be quite as much from this peculiarity of structure, as from the lack of care in blasting. For the evidence is not variant, that no greater amount of powder is used to a charge than is common among miners. It was, however, a question of fact for the trial court, and there is testimony from which such a finding may be drawn.

It has also excepted to the refusals to find as requested. Certain of these are as fully met as the defendant has a right to insist upon, by a finding of the request, with a qualification which is sustained by portions of the testimony. Some of them are refused, where no evil result seems to have followed to the defendant ; for no conclusion of law or adjudication has been made, inconsistent with the existence of the fact, the finding of which was requested. Those of them, in which the defendant requested the learned justice to find that all of the use made by it of the ground was necessary in the operation of the mine, were addressed to the very important issue in the case, upon which much of the testimony taken had a bearing. The learned justice had before him testimony which, if he gave it preponderance, sustains his refusal. Others of requests refused are not now material, or were properly then declined. The important one, as to the blasting, contains several matters, some of which might well have been found, but others which we think that it was in the learned justice to decline, according as he viewed and weighed the variant testimony. Thus it was shown, without contradiction, that it is customary to blast by night as well as day in mining ; it was testified that the defendant had taken all the care that it possibly could in blasting, and had done nothing that was not necessary ; that the charges did not exceed one pound of powder to any blast, while blasts are customarily made with twenty-five pounds ; it was testified, with no contradiction, that there was no other way of dislodging the ore than by blasting it out. On the other hand, it was shown that the effects of the blast were much felt by the plaintiff and his family and his house, and that it was unusual for a house to be so affected by the blasting in a mine.

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Now, one request refused contained this clause : "The blasts of the defendant have not been unusual in size." We have before commented on the affirmative finding of fact on this subject, and for the same reasons we are obliged to conclude that here was the power in the learned justice to refuse to find as requested. He might infer, from unusual effect, unusual power. Another request refused was that the defendant's operations in blasting had "been conducted with all possible care." The same reason applies to the refusal of this.

The defendant excepts to the several conclusions of law : 1st. That the tramway cannot by right be raised above the level of the ground, unless so high as that it may be passed under by horses and carriages. 2d. That it has no right to deposit or keep upon plaintiff's land any ore or refuse stuff or rubbish, or any barn, stable, blacksmith shop, powder-house or other building. 3d. That it has no right to blast in the night-time, during the hours for sleep. 4th. Nor at any time, so as to shake, crack or injure the erections of the plaintiff. 5th. That it has a right to sink a steam engine on the premises, for the purpose of working said mine, but not in the manner in which it has operated it. 6th. That it has no right so to work the mine as to deprive the plaintiff's premises of the necessary support to prevent the surface from falling in. 7th. To the amount of damages and to the judgment ordered.

The sixth of these findings, for reasons above given, must be construed as holding no more than that the surface, in its natural state, must have sufficient support from the underlying minerals. In this view it is correct.

As to all the rest of these conclusions, except as to one hereafter especially noted, they are right or not, as is found the one controlling question of fact whether the acts of the defendant to which they refer were or were not necessary for the profitable and beneficial enjoyment of the defendant's property. We have given our view of the legal principles which should govern such cases as this. It will have been observed that the application of them hinges on this fact. The learned justice has not found it ; he has refused to find it. He would find no more than that it was convenient. Whatever might be our opinion as to the necessity of the use, if we should look into the testimony, we are not at liberty so to do, to reverse a judgment, when there is any testimony which



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will sustain him in not so finding. And that there is. One conclusion of law excepted to is : That the defendant has no right to blast in the night-time, during the hours for sleep. And, based upon this conclusion of law, is an adjudication that it be restrained from blasting upon or underneath the lands of the plaintiff, in the night-time, during the hours usually devoted to sleep. There is no support for this conclusion and adjudication in any of the findings of fact unless it be these : first, that the blasting in the night-time does disturb the sleep of the plaintiff and his family, and as a consequence affects their health ; and second, that the improper and unlawful blasting, in the night-time, has diminished the value of the plaintiff's premises. The first fact stated is not sufficient. It is an effect of the act ; the same as the rupture of the surface of the land in driving the cut is an effect of an act. Yet, unless the acts are without necessity, the defendant is not to be restrained. It is usual to blast, and the ore cannot be got without it. It is usual, in all mines, to work and make blasts by night as well as by day. Of course it is, for day is as night down in the mine. The second statement, "improper and unlawful blasting in the night-time," if it be received as a finding of fact, does not warrant the conclusion of law, that the defendant has no right to blast at all in the hours of the night devoted to sleep. It would warrant no conclusion other than that it has no right to blast improperly and unlawfully, and that it be restrained from that. Looking into the testimony to see what facts are shown on this head, we do not find any that will sustain a finding that it is not necessary for the defendant to blast of nights. Rather the contrary. The general term, it would seem, was of this opinion, for it disallowed the damages awarded the plaintiff on this account ; but it did not modify the judgment by reversing that part which restrains the blasting at all during sleeping hours.

It will be seen that, technically, there is but one error of the learned justice who tried the action, so disclosed by the case as to authorize this court, according to settled rules, to disturb the judgment. And yet it will also be seen that the findings of fact and the request and refusal to find fail to apply with strictness to the acts and doings of the parties upon these premises—the legal test which will alone exactly and correctly determine their relative rights and duties. That is the test of necessity. As to each of the acts of the defendant complained of, it should have been found as

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a matter of fact, whether or not it was necessary to be done for the reasonably profitable enjoyment of its property in the minerals. Without this test applied by the courts, the differences between the parties fail to have been correctly and finally determined. For this reason we have concluded, rather than to modify the judgment in the one particular, to reverse it, and to send the case back for a new trial.

In this view, it is unnecessary to look into the questions raised as to the various items of damages adjudged.

The judgment should be reversed and a new trial granted, costs to abide the event.

All concur.

*Judgment reversed.*

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KELLEY, plaintiff in error, v. PEOPLE.

(55 N. Y. 565.)

*Criminal law — silence of person accused as evidence of guilt. Evidence of conspiracy. Qualification of juror.*

When declarations are made in the presence and hearing of an accused person of matters within his personal knowledge, and affecting his guilt, and he remains silent when it would be proper for him to speak, this circumstance is presumptive evidence, however slight, of guilt; and it is no objection to the admission of such circumstance in evidence that the accused was under arrest.

Defendants were arrested on charge of stealing money from the person, and the prosecutor was taken to their place of custody to identify them. They were identified, and the prosecutor, in their presence and hearing, described the money, and the defendants made no reply. On searching one of the defendants, two parcels of money were found; one answering the prosecutor's description. The other parcel defendant asked to be kept separate, saying it was "bar money." *Held*, evidence of defendant's acquiescence in the truth of prosecutor's statement.

A conspiracy may be proved by circumstantial evidence; and parties performing disconnected overt acts, all contributing to the same result and the consummation of the same offense, may, by the circumstances and their general connection or otherwise, be satisfactorily shown to be conspirators and confederates in the commission of the offense.

By statute (3 R. S. 411, § 18), jurors are to be selected and put on the list from such persons as are assessed for personal property, or own a freehold estate in real property. P. owned a farm when he was put on the list, but was not

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assessed for personal property. Before the trial, he sold his farm, receiving a mortgage for part of the purchase-money; and at the time of the trial he was not a freeholder, and was not assessed for personal property. He was challenged. *Held*, that he was not a competent juror. The property qualification, when questioned by a challenge, must be that required to authorize the original selection of the individual as a juror.

INDICTMENT against Andrew Kelley and others for grand larceny. It appeared that Job H. Reynolds, the prosecutor, came to Albany from Michigan, and took passage for New York on the night boat. Before its departure he entered into conversation with a stranger, who wanted him to go and identify a man who, he said, had been killed on the railroad, having papers on his person showing him to be from Michigan. The conversation was received in evidence, under objection. Reynolds went with the stranger, but found no dead man. He was then enticed into a saloon where defendants were, and his money was there stolen. Defendants were soon arrested; and Reynolds directed the attention of the officer having one of the defendants in charge to James Mulhall, also indicted, saying, "there is another of them." The evidence was objected to, but admitted. Reynolds having gone with an officer by the name of Sullivan to search for the man who enticed him away, Mulhall stepped up to Clune, one of the defendants in charge of an officer, and said, "Sullivan is all right, or will make it all right." This was received under objection. Reynolds went to the station-house to identify Kelley and Ormsby, two of the defendants. He pointed them out as two of the persons engaged in the theft. He told what part was taken by each, and described the money. Kelley and Ormsby made no reply. This was objected to, but admitted. Two parcels of money were then found on Ormsby, on searching him, one parcel answering the description. Ormsby asked that the other parcel be kept separate, saying it was "bar money." The points arising in the case are stated in the opinion. Defendants were convicted. Judgment on the verdict was affirmed at general term, and defendants brought error to this court.

*R. W. Peckham*, for plaintiffs in error. It was error for the court to admit evidence as to the silence of the accused, when at the station-house under arrest Reynolds pointed them out to the police-officers and declared them to be guilty. 1. Phil. Ev. (O. H. & E.'s ed.) 436-442, 443, 445; *Rex v. Appleby*, 3 Stark. N. P.

*Oas* 33; *Rex v. Turner*, 1 Mood. C. Oas. Res. 347; *Meton v. Andrews*, 1 Mood. & Malk. 336; *Child v. Grace*, 2 C. & P. 199; *Rex v. Hollingshead*, 4 id. 242; *Sheridan v. Smith*, 2 Hill, 538; 1 Greenl. Ev., § 199; 1 Phil. Ev. 400; *Commonwealth v. Kinney*, 12 Metc. 235; Burr. on Circ. Ev. 482. Such evidence could not be used to strengthen Reynolds' testimony. *Robb v. Hackley*, 23 Wend. 50; *Dudley v. Bolles*, 24 id. 465; 1 Stark. Ev. 187; 1 Phil. on Ev. (C. & H. Notes) 306-308 (2d Am. ed. of 1843). Reynolds' declaration as to the kind of money he had on him was inadmissible. 1 Phil. on Ev. 400 (3d ed. 1849); 2 Russ. on Crimes, 865, note; *Robinson v. Blen*, 20 Me. 109. A conspiracy must be established by other and satisfactory evidence before the declarations of a third party are admissible against another alleged conspirator. 40 N. Y. 228, 229; 2 Russ. on Crimes, 696, 697, note; 1 Whart. Am. Crim. Law, §§ 702, 703; 1 Greenl. on Ev., § 111; 1 Archib. Cr. Pr. and Pl. 409, note; 1 Phil. on Ev. (C. & H. and Edw. Notes, 1st ed.) 83, 185, note, 205, 208; *Waterbury v. Sturtevant*, 18 Wend. 353; *The State v. Dean*, 13 Ired. 53; *Moore v. Meacham*, 10 N. Y. 207; *Matter of Taylor*, 9 Paige, 611; *People v. Parish*, 4 Den. 153; *Newlin v. Lyon*, 49 N. Y. 651; *Cuyler v. McCartney*, 40 id. 221; *Erben v. Lorillard*, 19 id. 299. Perry was a competent juror, and his rejection was error. R. S. 412, § 13; id. 415, § 33. A new trial should be granted, unless it is shown that no injury could possibly have resulted from the error. *People v. Gonzales*, 35 N. Y. 59; *Greene v. White*, 37 id. 405; *Starbird v. Barrons*, 43 id. 200, 204.

*N. C. Moak*, district attorney, for defendants in error. The motion for a separate trial, as to Palmer, was properly granted. 1 Bish. Crim. Proc. (2d ed.), § 1018; *Commonwealth v. Robinson*, 1 Gray, 555; *People v. Williams*, 19 Wend. 337; *Allen v. State*, 10 Ohio St. 287. The court properly held that Perry was not a qualified juror. 2 R. S. 411, § 13, sub. 3; 2 Edm. Stata. 428, 429; Grah. Pr. (2d ed.) 299; 1 id. (3d ed.) 744; 1 Burr. Pr. 454; Coke on Litt. 156; Edwards' Juryman's Guide, 54, 93; 2 T. & S. Pr. 459, 463; 1 Edm. 363, § 8; *Mygatt v. Washburn*, 15 N. Y. 318-320; *Rundell v. Lake*, 40 id. 513; *Cochran v. Gould*, 106 Mass. 29. If he was competent, the rejection of him was no ground for a reversal. *People v. Gonzales*, 35 N. Y. 60; *Frankel v. People*, 65 Barb. 48, 51; *Ellington v. Ellington*, 47 Miss. 351,

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352; *Freeman v. People*, 4 Den. 9. It was proper to receive in evidence Reynolds' opinion as to the genuineness of the money which was stolen from him. *Remsen v. Hannigan*, 57 Barb. 324, 336; *People v. Fallon*, 6 Park. 256; 2 Bish. Crim. Proc. (2d ed.), § 469; *People v. Davis*, 21 Wend. 309. It was proper to receive evidence as to what took place between Reynolds and Mulhall on the steamboat. *Rex v. Parsons*, 1 W. Bl. 392, 401; *Rex v. Cope*, 1 Stra. 144; *Rex v. Murphy*, 8 C. & P. 297, 309, 310; *U. S. v. Cole*, 5 McL. 513, 601; 2 Bish. Crim. Proc. (2d ed.), § 227. A conspiracy may be proved by the acts of the parties or by circumstances, as well as by their agreement. *John Taylor's case*, 1 City Hall Rec. 192; *Street v. The State*, 2 Morris' State Cas. 1591; *Commonwealth v. Eaton*, 8 Phila. 419; 2 Bish. Crim. Proc. (2d ed.), §§ 228-231; *Rosc. Crim. Ev.* 88, 383-387; *Scott v. The State*, 30 Ala. 503. The fact that the police officer did not hear all the conversation did not render what he heard inadmissible. *Williams v. Keyser*, 11 Fla. 234. The fact that a person charged with a crime is under arrest does not render what he says or does inadmissible. *People v. Wentz*, 37 N. Y. 303; *People v. Montgomery*, 13 Abb. (N. S.) 209; *People v. Long*, 43 Cal. 444; *Commonwealth v. Cuffe*, 108 Mass. 285; *Commonwealth v. Crocker*, id. 464. What a third person says in the presence of the person charged is admissible against him if he remains silent. His silence must be taken as an acquiescence in its truth. *McKee v. People*, 36 N. Y. 116; *Hochrieter v. People*, 2 Abb. Ct. App. Decis. 363; *Cas. in Ct. Apps., Ct. App. Lib.*, vol. 144, case 1, pp. 10, 11; *Donnelly v. The State*, 26 N. J. L. (2 Dutch.) 464; *Bartlett's case*, 7 C. & P. 832; 1 Phil. & Amos, § 696; *Joy. on Conf.* 77; *Greenl. Ev.*, §§ 197, 215; *Whart. Cr. L.*, § 696 (ed. 1857); *Commonwealth v. Kenney*, 12 Metc. 235; 26 N. J. L. R. 601, 613; *Spencer v. The State*, 20 Ala. 24, 27; *Rex v. Smithers*, 5 C. & P. 332; *Best on Presump.*, § 241; *Burr. Cir. Ev.* 482, 483; *MacDonald's Cr. L. of Scotland*, 543; *People v. McCrea*, 32 Cal. 98; *Russ. on Crimes*, 866, citing 1 Phil. Ev. 400; *Lewis v. Blair* (High Ct. Scotland), 3 Irvine, 16; 1 Taylor's Ev. (6th ed.), § 739; *Fenns v. Weston*, 31 Verm. 345; *Mattocks v. Lyman*, 16 id. 113; *Liles v. State*, 30 Ala. 24; *Johnson v. State*, 17 id. 624; *Martin v. State*, 28 id. 81; *Rosc. Cr. Ev.* 115; *Fralich v. People*, 65 Barb. 48, 51; *Jewett v. Bannigan*, 21 N. Y. 27, 27. Statements made by the accused as a witness in exculpation of another charged with the same offense, may be proved. *MacDonald's Cr. L. of*

Scotland, 543 ; *Edmonston's case*, 1 Scotch L. R. 107 ; 2 Russ. on Crimes, 865, 866. Where there is a question of identity it is proper to show that a witness, unacquainted with a party, identified him shortly after the occurrence. *Reg. v. Blackburn*, 6 Cox's Cr. Cas. 333 ; *Rex v. Dearing*, 5 C. & P. 165.

ALLEN, J. The voluntary declarations and admissions of one on trial for a criminal offense, that is, those not made under duress, or induced by menaces or promises, are always evidence against the party making them, and are more or less cogent as evidence of guilt, depending upon the circumstances under which they are made. The same principle gives effect to the action of the accused as evidence tending to prove or disprove his guilt *Teachout v. People*, 41 N. Y. 7 ; *People v. Wentz*, 37 id. 303 ; *Commonwealth v. Cuffee*, 108 Mass. 285 ; *Same v. Crocker*, id. 464. When the conduct of the accused, either before or after being charged with the offense, is given in evidence, it is for the jury to draw the proper inferences and determine whether it is consistent with innocence, or is indicative of a guilty mind, proving more or less conclusively the commission by him of the particular offense charged. *Rosc. Crim. Ev.* 18 ; *People v. Rathbun*, 21 Wend. 509.

When an individual is charged with an offense, or declarations are made in his presence and hearing touching or affecting his guilt or innocence of an alleged crime, and he remains silent when it would be proper for him to speak, it is the province of a jury to interpret such silence, and determine whether his silence was, under the circumstances, excused or explained. At most, silence under such circumstances is but an implied acquiescence in the truth of the statements made by others, and thus presumptive evidence of guilt, and in some cases it may be slight, except as confirmed and corroborated by other circumstances. But it is some evidence, and therefore, except in those cases where the statements are made upon an occasion and under circumstances in which the individual sought to be affected could not with propriety speak, as in the progress of a judicial investigation, or in a discussion between third persons not addressed to or intended to affect the accused or induce any action in respect to him, so that for him to speak would be a manifest intrusion into a discourse to which he was not a party, the evidence is competent and should be admitted. Any declaration of the individual in response to a statement so made would be admissi-

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ble in evidence, and an omission to make any answer to it or notice it, like other acts of the party, is to be interpreted, and such effect given to it as evidence, in connection with the other circumstances of the case, as the jury in their discretion shall think it entitled to. The implication of assent to a statement affecting the guilt or innocence of an individual, from an omission to controvert, qualify or explain it, arises from the fact that a person knowing the truth or falsity of a statement affecting his rights, made by another in his presence, will naturally, under circumstances calling for a reply, deny it, if he be at liberty to do so, if he do not intend to admit it. *Donnelly v. State*, 2 Dutch. (N. J.) 601. It is no objection to the admission of the declarations of the accused, as evidence, that they are made while he is under arrest, and his admission, either express or implied, of the truth of a statement made by others under the same circumstances is equally admissible. His conduct and acts, as well when in custody as when at large, may be given in evidence against him, and their cogency as evidence will be determined by the jury. *People v. Wentz*, *supra*; *Hochrieter v. People*, 2 Abb. Ot. of App. Dec. 363; *McKee v. People*, 36 N. Y. 113; *Teachout v. People*, *Commonwealth v. Cuffee*, and *Same v. Crocker*, *supra*.

The case of the *Commonwealth v. Kenney*, 12 Metc. 235, was peculiar in its circumstances, and the opinion by the learned chief justice, speaking for the court, would seem not to be in harmony with the current of authority in this country or in England, or with the elementary writers. It is distinguishable from this case in this, that there was no direct evidence of the body of the offense, nor any evidence of the main fact, except as implied by the omission of the prisoner to deny the statement of the individual claiming to have been robbed, of the fact of the robbery and a description of the money lost. To make the evidence admissible as an implied admission of the fact stated, it had to be assumed that the accused had personal knowledge of the facts stated; for he was only called upon to deny and could only deny statements of the truth or falsity of which he had personal knowledge. Here the *corpus delicti* was proved by other evidence, and neither the declarations of the prosecution nor the admission of the prisoners, either express or implied, were relied upon for that purpose. The sole object and purpose of the evidence objected to was to identify the persons accused as the individuals committing the offense, and

upon that question they were well qualified to speak and knew whether the statements of the prosecutor were true or false. The declarations and statements of the prosecutor, in the presence and hearing of Kelley and Ormsby at the second precinct station-house, with proof that the prisoners did not controvert them, were properly given in evidence. The persons named had been arrested upon hot pursuit immediately after the offense, without process, and taken to that place for safe custody, and the prosecutor was there to identify them and have them further detained if he should recognize them as among those concerned in the alleged larceny. He did identify them and charged them with participating in the robbery, stating the part each took in the commission of the offense; and it was not only proper for the prisoners to speak if the prosecutor was mistaken and they were innocent, but the circumstances were such as apparently to call for a denial. Although the statements were not addressed directly to them, they were the subjects of the conversation and parties to it, in this that they could with propriety and without a breach of decorum take part in it. They were for all practical purposes parties to the discussion. The declaration was in substance a challenge to them to assert their innocence if they were not guilty. The description of the money by the prosecutor was not a very material part of the transaction, but it was not incompetent. It was clearly not irrelevant, and, taken in connection with the fact that the description tallied with that of one parcel of money immediately thereafter found on the person of the prisoners, who made a request that the two parcels found on him should be kept separate, as the other parcel was "bar-money," making no reference to that which had been so well described by the prosecutor, or controverting his claim to it, gave it significance, and made it material as an implied acquiescence in the truth of the statement of the prosecutor that he had been robbed of that money by the prisoners and their associates.

It is true that the record does not show that the prosecutor gave evidence of any reply or omission to reply to the statements, but the counsel for the prisoners objected to evidence that the prisoners remained silent when the prosecutor described the money lost and declared that they were the persons who had taken it, and the objection was overruled and exception taken, and other witnesses present at the same interview supplied the omission and proved that they made no answer or statement except that referred to in



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respect to the two parcels of money, and a statement by both that the prosecutor was mistaken as to a third person whom he supposed was present at the larceny, they declaring he was not present. The correction of the mistake of the prosecutor, as to the presence of one of the individuals accused by him, gives significance to their silence as to their own presence at and participation in the robbery. The statements of the prosecutor were only in evidence as laying the foundation for and giving character and effect to the declarations, as well as the silence of the prisoners, and were not proved either as evidence of the facts stated or as corroborative of the testimony of the prosecutor-in-chief. All the circumstances necessary to render the evidence admissible, and give effect to the silence, as well as the declaration of the accused, were present.

1st. The statements and declarations of the prosecutor, identifying the prisoners, were pertinent and relevant to the occasion upon which they were made, and the offense to which they related, and the detention of the accused. They were part of the *res gestæ*.

2d. They were made in the presence and hearing of the parties interested, and whose rights were affected by them, and under circumstances which rendered a contradiction or explanation by the prisoners proper and reasonable, if they were not true.

3d. They were of matters, the truth of which was known to the accused.

4th. A reply by the prisoners would have been natural and proper if the statements were false.

The evidence of the remark of Mulhall, to the prisoner Clune, that Sullivan, one of the officers aiding in the arrest, was all right, or would make it all right, was objected to as incompetent and immaterial. There was *prima facie* evidence of a combination and confederacy between Mulhall, Clune and the others aiding in the commission of the offense, and any conversation between Clune and Mulhall, relating to the offense or the means of avoiding detection or evading punishment, was competent as against either, and it was only proved as against Clune, Mulhall not being on trial. It was pertinent and relevant to the issue, and, therefore, it was not error to admit it, although it is believed it could not have affected the result of the trial. It was certainly not so material that it might not have been stricken out without essentially weakening the prosecution. As said by Judge COWEN, in *People v. Rathbun*, *supra*, of circumstantial evidence, it is extremely difficult to establish a

case of irrelevancy in the matter of the declarations and conduct of persons accused of crime, or of confederates in crime in the presence of each other. The acts and declarations of the person by whom the complainant was enticed from the steamboat and led to the saloon where the larceny was committed, were clearly competent as a part of the *res gestæ*. There was abundant evidence to justify the conclusion that the parties were all acting with a common purpose and a common design, and although there may have been no previous combination or confederacy to commit this particular offense, the conduct and actions of the several parties, and the parts they severally performed in the actual perpetration of the crime, was sufficient to make the acts and declarations of each, from the commencement to the consummation of the offense, evidence against the others.

A conspiracy may be proved, as other facts are proved, by circumstantial evidence, and parties performing disconnected overt acts, all contributing to the same result and the consummation of the same offense, may, by the circumstances and their general connection or otherwise, be satisfactorily shown to be conspirators and confederates in the commission of the offense. One party may allure the victim into the den, leaving it to others to effect the robbery, and all will be held equally guilty as confederates. Here the decoy remained with the victim until the larceny was committed, and his relation to and intimacy with the persons on trial were such as to authorize the jury to draw the conclusion that there was a conspiracy between all those present or taking any part in the transaction. The declarations were not given in evidence to prove the guilt of the parties on trial, and as the declarations of one conspirator against another, but as a part of the *res gestæ*, a part of the history of the transaction, and as such it was competent. The means adopted to entice the complainant from the steamboat were as much a part of the larcenous taking of the money, contributing as directly to the commission of the completed offense, as was the taking of the money by Ormsby. Both and all that intervened were part of the one transaction, culminating in the robbery effected by all the means employed by the offenders, whether in the presence of each other or when separated.

There was no error in the admission of evidence of the direction of the complainant to the officer to arrest Mulhall, given in the presence of Olune. It could not have prejudiced the prisoners on trial,

and was a part of the history of the pursuit and arrest of the offenders immediately after the commission of the offense, and may properly be regarded as a part of the *res gesta* transpiring in the presence of the prisoners as against whom only it was proved. But while it was not irrelevant, it is enough that by no possibility could it have prejudiced the prisoners or affected the result of the trial. Another answer might be found to the suggestion of error by reason of the admission of the evidence in the form of the objection and exception. The first question objected to was, "What did Reynolds say?" It having been proved that Clune was present and in hearing, and the evidence being offered against him, the question was competent and the objection properly overruled. The answer was, "There goes the other one," or "one of the parties," "the lawyer," pointing to Mulhall, and this was objected to as "not rebutting evidence," and on no other ground. If not strictly replicatory, although given in response to the evidence on the part of the defense, it was discretionary with the court to permit the prosecution to give evidence not strictly responsive, and an exception does not lie to the exercise of such discretion.

One Perry, drawn and appearing as a juror, was challenged by the prisoners, and on examination it appeared that at the time he was put on the jury list he was a freeholder owning a farm in Guilderland, for which he was assessed, but was not assessed for personal property. Before the trial he had sold his farm, taking back a mortgage for a part of the purchase-money, and at the time of the trial was not a freeholder and was not assessed for personal property. The challenge of the prisoners was withdrawn, but renewed by the prosecution and the juror discharged. The qualifications of jurors are prescribed in the directions to the town officers whose duty it is to select them and prepare the lists from which the ballots are prepared for the drawing of jurors. 2 R. S. 411, § 13. The direction is to take such only as, possessing the other qualifications, are at the time assessed for personal property belonging to them in their own right to the amount of \$250, or who shall have a freehold estate in real property in the county belonging to them in their own right, or in the right of their wives, to the value of \$150. The juror was not qualified, and could not, at the time of the trial, have been selected as a juror by the town officers, or been placed on the list of jurors. A subsequent section of the same statute (§ 33) makes it imperative upon the court to discharge any person from

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serving on a jury, when it shall appear that he is not at the time the owner of the freehold estate or real property prescribed by the statute, "and is not the owner of personal property to the value of \$250;" and it is claimed, on behalf of the plaintiffs in error, that, it not appearing that the juror did not own personal property to the amount named, it was error to allow the challenge of the prosecution. But this section was not designed to regulate or affect the challenges, but to give the right to the juror to be discharged on his own motion. The property qualification of the juror, so far as it depends upon the ownership of personalty, must appear and be evidenced by the assessment roll, and suitors are entitled to the benefit of the challenge, if this is wanting. When a juror applies in his own behalf to be discharged from the performance of his public duty, the legislature might well require him to prove, not only that he was not assessed for personal property, but that he ought not to be. But the general qualification of jurors, and the rights of those who may challenge such qualifications are not affected by this provision. The right of challenge for want of proper qualifications is a strictly legal right, and must be determined by the statute prescribing the qualifications. 3 Bl. Comm. 362. As an application for a discharge under section 33, it would not have been a part of the trial, but addressed by the juror to the discretion of the court and not to the subject of review. There was no error in disposing of the challenge and holding that the property qualification when questioned by a challenge must be that required to authorize the original selection of the individual as a juror.

The judgment must be affirmed.

All concur.

*Judgment affirmed.*

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STEWART V. PETREE, appellant.

(S. N. Y. CIR.)

*Usury — compound interest.*

The receiving of interest upon interest is not a violation of the statute of usury; and a note given for interest upon arrears of interest is valid.

ACTION by Cornelia M. Stewart against Moses Petree on a promissory note. The defense was usury. A mortgage had been

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due for ten years, no interest had been paid, and the owner of the mortgage commenced foreclosure. He agreed, however, to extend the time upon payment of interest on arrears of interest. Simple interest was then reckoned and also compound interest; and the note was given for the difference between the amounts of interest. The court directed a verdict for plaintiff. Judgment on the verdict was affirmed at general term; whereupon defendant appealed to this court.

*O. O. Cottle*, for appellant. Compound interest exacted as a condition of forbearance after the debt has become due is usurious. 4 *Mad. Ch.* 38; 1 *Johns. Ch.* 13; 6 *id.* 313; *Ward v. Brand*, 1 *Heisk.* (Tenn.) 490; 4 *Rand. (Va.)* 411; 9 *Ves.* 271; *Shirley v. Harris*, 3 *McL.* 330; 9 *Pet.* 418; 34 *Barb.* 157; 17 *N. H.* 43; 36 *Vt.* 186; 3 *Stockt. (N. J.)* 49; 35 *Ala.* 580; 14 *Ind.* 607; 22 *Tex.* 120; 9 *Paige*, 211; 7 *id.* 581; 5 *Branch.* 356; 6 *Cal.* 126; 4 *Randf.* 411; *Andrews v. Poe*, 30 *Md.* 485; *Townsend v. Corning*, 1 *Barb.*; *Thurston v. Cornell*, 38 *N. Y.* 285; *Ketchum v. Barber*, 4 *Hill*, 224; 1 *Bos. & Pul.* 144, 151, 154. An express promise to pay compound interest for periods already past is without a consideration which the law can recognize. *Smith v. Ware*, 13 *Johns.* 257; 3 *Bos. & Pul.* 249; *Law's Pl. Assump.* 54; 16 *id.* 283, *n*; *Ehle v. Judson*, 24 *Wend.* 97; 11 *Add. & Ell.* 438; *Watkins v. Halstead*, 2 *Sandf.* 311; *Geer v. Archer*, 2 *Barb.* 420; *Nash v. Russell*, 5 *id.* 556. It is sufficient to avoid the note, that it was given in consideration of an agreement to forbear, that it was taken intentionally, and was in excess of lawful interest to the knowledge of the creditor. *Wright v. Elliott*, 1 *Stew. (Ala.)* 391; *First Nat. Bank of Milwaukee v. Plankinton*, 27 *Wis.* 177; *Vickery v. Dickson*, 27 *id.* 177, 184; *Berlin v. Mapes*, 38 *How.* 288; 31 *N. Y.* 473; *Kerr on Law of Fraud and Mistake*, 48, 50; *Thomas v. Fish*, 9 *Paige*, 478; *Maine Bank v. Butts*, 9 *Mass.* 55; *Craig v. Pleiss*, 26 *Penn.* 271; *Edwards v. Skiroing*, 1 *Brev.* 548; *Levy v. Gadsby*, 3 *Cranch*, 180; *Treascott v. Davis*, 4 *Barb.* 495; *Bessange v. Ross*, 29 *id.* 576, 578; *Wright v. Elliott*, 1 *Stew. (Ala.)* 391; *Tyler on Usury*, 353; 27 *Wis.* 124; *Cary v. Hotailing*, 1 *Hill*, 315. Whether a transaction is a cover for usury is a question of fact. 9 *Pet.* 418; *Ketchum v. Barber*, 4 *Hill*, 224; *McKesson v. McDowell*, 4 *Dev. & Bat.* 120.

*J. E. Dewey*, for respondent. An agreement to pay interest upon interest due at the time the promise is made is valid and binding. *Townsend v. Corning*, 3 N. Y. Leg. Obs. 957; affirmed, 1 Barb. 627, 632; 1 Johns. Ch. 13; 6 id. 313; *Tyles v. Yates*, 3 Barb. 223; *Kellogg v. Hickok*, 1 Wend. 521; *Mowry v. Bishop*, 5 Paige, 98; *Forman v. Forman*, 17 How. Pr. 255, 257; *Platts v. Walraek*, H. & Den. Supp. 59, 63.

ALLEN, J. The only defense interposed was usury, upon the ground that the note was given for interest upon arrears of interest, or compound interest upon a mortgage long past due, held by the payee of the note, and payment of which was further extended upon the receipt of the note. There was no conflict in the evidence, or any disputed fact; and there was no request by the defendant to go to the jury upon the question of intent, or whether the transaction was colorable and intended as an evasion of the laws prohibiting the taking of usury. The receiving of interest upon interest is not a violation of the statute of usury, as no more than seven per cent is in such cases taken or received. It is true that an agreement in advance for the payment of interest upon interest, as the same shall accrue, cannot be enforced, not because it is usurious, but for the reason that such an agreement is regarded in this State as against public policy — as one that may be made oppressive to the debtor; but a prospective agreement, after the interest has accrued, to pay interest thereon, is valid; and money paid for compound interest cannot be recovered back.

So, too, a security for interest upon interest, given after it has accumulated, and in the absence of any prior undertaking to pay it, is valid, and supported by a good consideration. The interest upon the interest is but the usual equivalent for the non-payment of the interest at the time agreed upon; and an agreement in writing to pay the interest on the arrears of interest only secures to the creditor a remuneration for that which he has lost. Chancellor KENT seems to have doubted the correctness of the last proposition, and to have decided adversely to it in *Van Benschooten v. Lawson*, 6 Johns. Ch. 313; and Chancellor WALWORTH, in *Mowry v. Bishop*, 5 Paige, 98, distinguished between that case and the one then before him; but the doctrine is now too well settled by authority to be questioned in this State; and a note given on est-

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tlement of an account, or a statement of interest past due on an obligation, in any form, for compound interest, is not usurious. *State of Connecticut v. Jackson*, 1 Johns. Ch. 13; *Le Grange v. Hamilton*, 4 T. R. 613; S. C. (in Ex. Ch.), 2 H. Bl. 144; *Kellogg v. Hickock*, 1 Wend. 521; *Platts v. Walrath*, H. & Den. Sup. 59; *Townsend v. Corning*, 1 Barb. 627; *Tylee v. Yates*, 3 id. 222; *Ritter v. Phillips*, MS. Op. of FOLGER, J.

There was no assertion of a right to counter-claim for the amount alleged to have been paid for interest prior to the giving of the note, and for which no allowance was then made; nor was it claimed upon the trial that the same was designedly omitted from the settlement, with a view to secure more than the legal rate of interest, or an illegal compensation for forbearing and giving day of payment on the mortgage; neither was there a request to submit such question to the jury. The evidence was that that was left for future adjustment by the parties; and a part of the amount claimed to have been paid as interest had been refunded to the party paying it before the note was given.

There was no dispute or question as to the facts which the defendant asked to be submitted to the jury; and if there was any inference to be drawn by the jury from them or the circumstances of the case, the attention of the court should have been called to it by the defendant; and not having done so, he cannot now claim that there was error in taking the case from the jury.

But upon all the evidence the case was well disposed of at the circuit, and the judgment must be affirmed.

All concur except GROVER, J., not voting.

*Judgment affirmed.*

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**FLORIDA.**

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**BROCK, appellant, v. GALE.**

(14 Fla. 522.)

*Carrier — Liability for passengers' baggage — damages.*

In a suit against a carrier of passengers upon a steamboat for the loss of baggage, the plaintiff claimed for the loss of a set of dentist's instruments and special damages in the loss of the profits and earnings which he might have made if the instruments had not been lost. *Held*, upon demurrer, that such special damages could not be recovered, but only such damages as were contemplated or might reasonably be supposed to have entered into the contemplation of the parties to the contract of carriage.

It is a question for the jury to determine what articles of property, as to quantity, quality and value, contained in a passenger's trunk or valise, may be deemed baggage (subject to the power of the court to correct any abuse); and it is improper for the judge to designate by name what articles may be included in the term *baggage* of a traveler.

The goods contained in the trunk, etc., of an ordinary passenger, travelling upon a steamboat, are not the goods of a "shipper" of freight or baggage within the meaning of the 69th section of an Act of Congress, entitled "An act to provide for the better security of life," etc., approved February 28, 1871. (*See note, p. 563.*)

**APPEAL** from the judgment of the circuit court of Duval county.

Gale, plaintiff, sued Brock, defendant, to recover the value of a valise and its contents as the baggage of plaintiff, who was a trav-



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eling dentist who took passage on defendant's steamer Darlington, on the St. John's river, the valise having been lost on or before the arrival of the boat at its wharf in Jacksonville. The valise, as alleged, contained a set of dentist's instruments of more than ordinary value, ornamented with gold and jewels, and some articles of clothing.

The first count of the declaration was a special allegation that plaintiff paid his fare as a passenger on defendant's steamboat and delivered his valise and contents to defendant's servants on the boat, notifying them that it was very valuable (annexed was a schedule of the property valued at \$555.18), and alleged its non-delivery at the place of destination.

The second count alleged that the dental instruments were necessary to the pursuit of his business as a dentist, and were a part and parcel of his necessary baggage and effects as a traveling dentist, and that the loss thereof had subjected him to great loss and damage, in the inability of the plaintiff to pursue his profession, to wit, for six months, and thereby to make a livelihood and support, to his damage \$1,000.

Third count, for goods sold and delivered.

Fourth count, on account stated.

The defendant pleaded that he was not indebted as alleged; that he did not promise as alleged; that the goods were not delivered into his custody; that the goods were of little value; and that the dental instruments were not "baggage;" and defendant demurred to the second count, on the ground that the damages alleged were too remote; that the plaintiff can recover, if at all, only the value of the property, and not alleged consequential damages for loss of time and business.

The demurrer was overruled, and, upon trial, a verdict rendered for plaintiff for \$764.

*Fleming & Daniels*, for appellant.

*Cooper & Ledwith*, for appellee.

RANDALL, C. J. The first error assigned is, that the court refused to grant a continuance on defendant's motion, made upon the ground that the time of holding the court was not a legal term, because a term was appointed by the law to be held on the same day in St. Johns county and Duval county in the same circuit.

If the ground of the motion was valid, to-wit : that there was no legal term being held, the court could not act at all, and therefore could not make an order of continuance. If the ground of the motion was not valid, the continuance was properly refused. It is true that the court could not sit in both counties at the same time, but it does not follow that it could not sit in one county. The court was sitting in Duval, and was therefore not sitting in St. Johns. The judge held the term in Duval at the time named in the law for that purpose, as we think he might lawfully do.

Second. The appellant says the court erred in overruling defendant's demurrer to the second count in plaintiff's declaration, and third, in admitting illegal and irrelevant testimony under said second count.

The question here presented is, whether the plaintiff could, in this action against a common carrier for the loss of his baggage, he being a traveler upon defendant's steamboat, recover damages for the loss of the profits which he might have made in the practice of his trade or profession, if his baggage, including the implements of his trade, had not been lost. The third exception arises upon the questions put by plaintiff's counsel on the trial to the plaintiff as a witness in his own behalf, as to whether he was detained at Jacksonville in consequence of the loss, and what were his monthly receipts from his business at home, and whether he was prevented by the loss of his instruments from pursuing his profession and for what length of time. The court permitted the questions to be answered, notwithstanding defendant's objections. Witness answered that his receipts for several years had averaged three hundred dollars per month, or at least three thousand dollars per year ; that he was prevented by the loss of his instruments from pursuing his business to some extent for one month, and had never since been as well able to pursue his business for want of those instruments.

The law in such cases is laid down by Sedgwick in his book on the measure of damages as follows : "On reviewing the whole subject, it seems to me that the language of the Louisiana Code expresses the true rule ; and that it is no more than justice that a defendant in default should be compelled to make good the damages sustained by his breach of contract which were contemplated, or may reasonably be supposed to have entered into the contemplation of the parties at the time of the contract."

Under ordinary circumstances the damages flowing from a breach

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Brock v. Gale.

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of contract to carry and deliver goods would be the value of the goods at the time of the loss and interest on the amount. If the owner of the goods would charge the carrier with any special damages, he must have communicated to the carrier all the facts and circumstances of the case which do not ordinarily attend the carriage or the peculiar character and value of the property carried, for otherwise such peculiar circumstances cannot be contemplated by the carrier." For (says the court in *Hadley v. Baxendale*, 9 Exch. 341), had the special circumstances been known, the parties might have expressly provided for the breach of the contract by special term as to the damage in that case, and of this advantage it would be very unjust to deprive them. These principles are those by which we think the jury ought to be guided in estimating the damages arising out of any breach of contract." And in *Griffin v. Colver*, 16 N. Y. 489, SELDEN, J., states it thus: "The damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract—that is, they must be such as might naturally be expected to follow its violation; and they must be certain, both in their nature and in respect to the cause from which they proceed."

In the present case there is no room for pretense that the defendant contemplated that the plaintiff would sustain any damage beyond that which would follow the loss of any kind of baggage; *i. e.*, the value of the goods and the expense of a brief detention in endeavoring to find them, with interest. The defendant cannot be chargeable for the loss of dentist's tools beyond what he would be liable to pay any other passenger for the loss of any goods of like value, unless he has especially agreed to be responsible for other loss or damage. Doctor Gale did not inform the defendant that he was a dentist; that his tools were set with diamonds and rubies, or that in case they should be lost he would be unable to pursue his avocation for six months or for one month; and hence the defendant did not contemplate any such risk in carrying him as a passenger upon his steamboat, with his valuable baggage.

The court therefore erred in overruling the defendant's demurrer to the second count in the declaration, and in admitting testimony as to the probable earnings of the plaintiff as a measure of damages for the loss of the goods, and the court should have charged the jury in such manner as to confine their inquiries upon this subject to the rule we have indicated.

The fourth and fifth errors assigned are, that the court erred in its charge to the jury, and in charging the jury as requested by the plaintiff.

It is unnecessary to elaborate upon these propositions. In examining the record we find that the judge's charge is in the main correct, except in its too general language as to the allowance of damages, already alluded to. It is not entirely proper, however, for the judge to specify what particular articles of property, designating them by name, may be included in the term "baggage," as this comes very nearly to an argument and opinion upon the proofs in the case. For instance, in giving the fourth instruction asked for by plaintiff to the jury, this language was used: "Thus a carpenter's tools have been held suitable baggage for a carpenter, a surgeon's instruments for a surgeon." While it is true that courts have refused to set aside a finding of a jury to that effect, on the ground that "it is for the jury to decide whether the articles contained in the plaintiff's valise, for which payment is claimed, are such property as may be deemed baggage" (as the jury were instructed on the request of the defendant), it is not proper for the court to suggest, by way of example, that which may influence the jury upon the question of fact they are to try.

The sixth error assigned is that the court refused to charge the jury, as requested by the defendant's counsel. The instructions asked by the defendant's counsel were given by the court, except the 4th, 5th, 6th, and 7th, and of these, all except the 7th had already been given in substance. It is not error to refuse to repeat a charge already given.

The seventh instruction asked by the defendants' counsel is in these words: "If it appears that the valise in question contained jewelry or precious stones, or instruments set with gems, precious stones, or gold, or other precious metals, or gold or silver plated or mounted instruments. and that no written notice of the character and value of the same was given to the master, clerk, agent or owner of defendant's said steamboat, then defendant is not liable for the same as a carrier." This was refused by the court. It is insisted by the defendant that this instruction should have been given according to the provisions of the 69th section of "An act for the better security of life," passed by the U. S. Congress, and approved February 28, 1871, which provides, "if any shipper or shippers of platina, gold, gold dust, silver, bullion or other

metals, coins, jewelry, bills of any bank or public body, diamonds or other precious stones," and other like articles enumerated, "contained in any parcel or package or trunk, shall lade the same as freight or baggage on any boat or vessel, without at the time of such lading giving to the master, clerk, agent or owner of such boat or vessel receiving the same, a written notice of the true character and value thereof, and have the same entered on *the bill of lading therefor*, the master and owner or owners of said boat or vessel shall not be liable as carriers thereof."

It seems clear, however, that this section refers to property of the descriptions mentioned, sent by shippers of such goods in the common mercantile acceptation of the words *shipper or shippers*, who forward goods as freight or baggage under bills of lading and that the act had in view the protection of the revenue of the United States, as well as the protection of vessels against fraud and against the penalty for violations of revenue laws. The language used does not well apply to a passenger who carries in his trunk his ordinary wearing apparel, ornaments and professional implements, however rare or valuable. He is not a shipper, and does not "lade" a vessel as a shipper, nor give or receive a bill of lading for his personal baggage, nor pay freight thereon, as does a shipper. We do not think the court erred in refusing to give the instruction.

The court charged the jury that "all articles, which it is usual for persons traveling to carry with them, whether from necessity, convenience or amusement, fall within the term *baggage*." And, "that if it appears by the evidence that the contents of the valise, or any portion of the same, were of a great or extraordinary value, for a person of plaintiff's business and station in life, without notice of the same being given to the defendant, he cannot be held liable for their loss." And the court further charged that it is for the jury to decide what articles in the valise came within the definition of baggage, and this last was given at the request of defendant's counsel. The Supreme Court of Pennsylvania in *McGill v. Rowland*, 3 Barr, 451, say that "it is not obvious in what manner the court can restrict the quantity or value of the articles that may be deemed proper or useful for the purposes of traveling, because in the nature of things it is susceptible of no precise or definite rule; and when there is an attempt to abuse the privilege, a court must rely on the intelligence or integrity of the jury to apply the

proper corrective." See Angell on the Law of the Carriers, § 115, *et seq.*

This, after all, is the correct rule for the determination of this case. The jury must determine, as a question of fact, whether the articles contained in the plaintiff's valise were the necessary and convenient articles of baggage of the plaintiff as a traveler, according to his occupation and position in life, and was their value a reasonable value of such articles to be carried as baggage, for the loss of which a common carrier should be held liable under the circumstances of the case. Any apparent abuse by the jury, whereby gross injustice should be done, would of course be corrected by the court.

For the errors in the proceedings and trial herein mentioned, the judgment must be reversed, and a new trial granted. The defendant is entitled to judgment upon his demurrer to the second count in the declaration.

*Judgment reversed, and a new trial granted.*

*NOTE.* — Compare *Dexter v. Syracuse R. R. Co.*, 1 Am. R. 527; *Toledo, Wabash, etc., R. R. Co. v. Hammond*, 5 id. 221; *Connolly v. Warren*, 8 id. 300, and note; *American Contract Co. v. Cross*, id. 371; *Rauzon v. Pennsylvania R. R. Co.*, id. 543; *Mole v. Chicago, etc., R. R. Co.*, 1 id. 313; *Wilson v. Grand Trunk Ry.*, 2 id. 26. — *REPEATED.*

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**TEXAS.**

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**MOORE, appellant, v. LETCHFORD.**

(35 Texas, 185.)

*Constitutional law — impairing obligation of a contract — modifying remedy.*

A statute provided that "whenever final judgment shall be rendered in any court of record of this State, said judgment shall become a lien on all the real estate of the judgment debtor." *Held*, (1) that under this statute, judgments rendered before its passage become liens from the time they were rendered, and (2) that the act so construed was constitutional.

**ACTION of trespass.** The material facts of the case are stated in the opinion.

*Richard S. Walker*, for appellant.

*F. B. Sexton*, for appellee.

**WALKER, J.** In an action of trespass to try title, the appellant, Asa Moore, failed in the district court; the verdict and judgment were for the defendant, William H. Letchford. The lands in controversy were the property of Blackstone Hardeman and L. T. Barrett. The appellant claims under a sheriff's deed; the appellee by

virtue of a deed from the United States marshal, and a conveyance from James B. Johnson, whose title is also by the sheriff. The appellee holds the older and better title to the land in controversy, although acquired through a junior judgment, unless, upon an examination of the law of the case, it shall be found that the appellant's judgment held the lands bound by a prior lien. The contest is, then, between judgment creditors for priority of lien. Moore's judgment against Hardeman and Barrett was rendered on the 6th of July, 1861, with stay of execution till the 1st of February, 1862. Letchford's judgment dates from the 9th of November, 1867. Johnson's judgment dates from the 20th of August, 1867. The sale at which Letchford bought was made in April, 1868. Moore purchased at a sale made June, 1868. No further notice need be taken of Johnson's title, as it stands or falls with Letchford's, and is a part of it.

There is no question as to priority of judgment. The act of February 14, 1860, which had repealed the acts of 1839 and 1840, was in force when Moore obtained his judgment. So far as the provisions of that act influence the case, they are as follows:

1. Judgments under this act did not become dormant, unless ten years should elapse between the issuance of executions.

2. No judgment rendered after the passage of the act operated as a lien on the lands of the judgment debtor, situated in the county where the judgment was rendered, until a transcript was filed for record in the office of the county clerk. The lien continued for four years, and could be kept alive by reinscribing within each succeeding quadrennial period. The issuance of execution was not a condition precedent to the lien. In examining the appellant's title, we do not look to this statute to determine whether he had a lien under it or not, but for the purpose of seeing whether his judgment remained alive under it until the 9th of November, 1866, for it is not claimed that he ever caused his judgment to be registered.

In accordance with the opinion which we have uniformly held, a judgment creditor lost none of his rights by the non-issuance of execution when hindered by any of the laws known as the stay laws. Moore, then, had a valid, living judgment on the 9th of November, 1866.

The act passed on that day provides that, whenever final judgment shall be rendered by any court of record of this State, such



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judgment shall become a lien on all the real estate of the judgment debtor situate in the county where the judgment is rendered. A proper understanding of the clause of the statute leads directly to the disposition of this case.

It will be observed that on the 10th day of November, 1866, the legislature passed another stay law.

The lien secured under the act of 9th of November, 1866, was lost, unless execution issued upon the judgment within one year from the first day upon which such execution could by law be issued thereon.

It matters not, in the judgment of this court, whether the law of the 10th of November, 1866, be declared unconstitutional, or not. We are clearly of opinion that if Moore gained a lien upon the land by operation of the act of the ninth of November, and was hindered from issuing his execution within the year, by the act of the 10th of November, 1866, he did not lose his lien, for he is guilty of no laches. The determination of this case, then, rests upon the interpretation to be given to that clause of the act of November 9, 1866, which gives a lien to judgments which *shall* be rendered.

A very learned discussion is found in the briefs, of the true rendering of this passage. Grammarians not unfrequently, in the construction of sentences, use the terms "shall be" and "shall have been" indifferently. Grammatical nicety only accords this privilege where time is really not referred to, but where the term is used rather as a constituent part of a proposition; thus we say indifferently, when a judgment shall be rendered, or when a judgment shall have been rendered, a lien shall attach, etc.

We are led to conclude that the legislature used the words "shall be" in this manner; they would otherwise have been separated by the word *hereafter*, or the words *in the future*. And there was, in justice, no reason for making an invidious distinction against judgments, and to the prejudice of judgment creditors, tied up and hindered during the long period of the civil war. Had it been the policy or intention of the legislature to make a distinction between judgments rendered before, and those after the act, justice and a sound regard to the rights of parties would have given the preference to the older judgments.

That principle of the law which holds parties guilty of laches to have thereby lost their rights, is founded in sound policy. But he

is not guilty of laches whose remedies are either suspended or taken away from him by the supreme power of the State, under the seeming dictation of necessity. By civil war the normal condition of society are necessarily more or less disturbed. The law, to which every man ordinarily looks for the protection of his rights, not unfrequently turns away from the individual, withdrawing its protection, and becoming a strong engine of oppression.

It has been said, "*inter arma leges silent.*" The laws were not silent during our late civil war, but, under the restored authority of the government of the United States, it has been found necessary to set aside and disregard many of the acts of legislation passed by an insurgent people. This court has declared unconstitutional the so-called stay laws; but we are compelled to attach such significance to them as will, at least, preserve the rights and equities of the people, so far as we have the authority to do.

A question is raised upon the record in this case, which the very learned counsel have not discussed, nor should we deem it necessary to the decision of the case, were it not that we are divided in opinion upon it.

It is thought that the law of 9th of November, 1866, attaching a lien to judgments, could have no application to judgments rendered prior to the passage of the act, and that such a law would be unconstitutional, as impairing the obligation of contracts.

A majority of the court conceive it to be clearly within the power of the legislature to apply the act to judgments previously rendered, as well as those to be rendered in the future.

The law simply applies to the enforcement of the remedy, impairing no obligation of the contract. See *Crawford v. Bender*, 33 Tex. 745 (7 Am. Rep. 270).

Cooley, in his learned work on Constitutional Limitations, after discussing the obligations of a contract, gives us so able a view of this question that we must be excused for introducing lengthy extracts, with citations of very numerous authorities: "Such being the obligation of a contract, it is obvious that the rights of the parties in respect to it are liable to be affected in many ways by changes in the laws, which it could not have been the intention of the constitutional provision to preclude.

"There are few laws which concern the general police of a State, or the government of its citizens, in their intercourse with each other or with strangers, which may not in some way or other affect

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the contracts which they have entered into or may thereafter form. For what are laws of evidence, or which concern remedies, frauds and perjuries, laws of registration, and those which affect landlord and tenant, sales at auction, acts of limitation, and those which limit the fees of professional men, and the charges of tavern keepers, and a multitude of others, which crowd the codes of every State, but laws which affect the validity, construction, duration or discharge of contracts. WASHINGTON, J., in *Ogden v. Saunders*, 13 Wheat. 259.

"But the changes in these laws are not regarded as necessarily affecting the obligation of contracts. Whatever belongs merely to the remedy may be altered according to the will of the State, provided the alteration does not impair the obligation of the contract. *Bronson v. Kenzie*, 1 How. 316, per TANEY, Ch. J. And it does not impair it, provided it leaves the parties a substantial remedy, according to the course of justice as it existed at the time the contract was made. *Stocking v. Hunt*, 3 Denio, 274; *Van Baumbach v. Bade*, 9 Wis. 578; *Bronson v. Kensie*, *supra*; *McCracken v. Hayward*, 2 How. 608; *Butler v. Palmer*, 1 Hill, 324; *Van Rensselaer v. Snyder*, 9 Barb. 302, and 13 N. Y. 299; *Conkey v. Hart*, 14 id. 22; *Guild v. Rogers*, 8 Barb. 502; *Story v. Furnam*, 25 N. Y. 214; *Coriell v. Ham*, 4 Green (Ia.), 455; *Heyward v. Judd*, 4 Minn. 483; *Swift v. Fletcher*, 6 id. 550; *Maynes v. Moore*, 6 Ind. 116; *Smith v. Packard*, 12 Wis. 371; *Grosvenor v. Chesley*, 48 Me. 369; *Van Rensselaer v. Ball*, 19 N. Y. 100; *Same v. Hays*, id. 68; *Litchfield v. McComber*, 42 Barb. 288; *Paschal v. Perez*, 7 Tex. 365; *Auld v. Butcher*, 2 Kan. 155; *Kenyon v. Stewart*, 44 Penn. St. 179; *Clark v. Martin*, 49 id. 299; *Rison v. Farr*, 24 Ark. 161; *Sanders v. Hillsborough Ins. Co.*, 44 N. H. 238; *Huntzinger v. Brock*, 3 Grant's Cas. 243; *Mechanics, etc., Bank Appeal*, 31 Conn 63.

"It has accordingly been held that laws changing remedies for the enforcement of legal contracts will be valid, even though the new remedy be less convenient than the old, or less prompt and speedy. *Ogden v. Saunders*, *supra*; *Beers v. Haughton*, 9 Pet. 359; *Bumgardner v. Circuit Court*, 4 Mo. 50; *Tarpley v. Hamer*, 17 Miss. 310; *Quackenbush v. Danks*, 1 Denio, 128; 3 id. 594; and 1 N. Y. 129; *Bronson v. Newberry*, 2 Doug. (Mich.) 38; *Rockwell v. Hubbell's Adm'rs*, id. 197; *Evans v. Montgomery*, 4 W. & S. 218; *Holloway v. Sherman*, 12 Iowa, 282; *Sprecker v.*

*Wakeley*, 11 Wis. 432; *Smith v. Packard*, 12 id. 371; *Morse v. Gould*, 11 N. Y. 281; *Penrose v. Erie Canal Co.*, 56 Penn. St. 46.

“Without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation shall direct. *Sturges v. Crowninshield*, 4 Wheat. 122, per MARSHALL, Ch. J. A statute allowing the defense of want of consideration in a sealed instrument previously given does not violate the obligation of contracts. *Williams v. Haines*, 27 Iowa, 251. To take a strong instance, although the law at the time the contract is made permits the creditor to take the body of his debtor in execution, there can be no doubt of the right to abolish all laws for this purpose, leaving the creditor to his remedy against property alone. ‘Confinement of the debtor may be a punishment for not performing his contract, or may be allowed as a means of inducing him to perform it. But the State may refuse to inflict this punishment, or may withhold this means, and leave the contract in full force. Imprisonment is no part of the contract, and simply to release the prisoner does not impair the obligation.’ *Sturges v. Crowninshield*, 4 Wheat. 122, per MARSHALL, Ch. J.; *Mason v. Haile*, 12 id. 370; *Brownson v. Newberry*, 2 Doug. (Mich.) 38; *Mazey v. Loyal*, 38 Ga. 540. Nor is there any constitutional objection to such a modification of those laws which exempt certain portions of a debtor’s property from execution as shall increase the exemptions, nor to the modifications being made applicable to contracts previously entered into. The State may, if it thinks proper, direct that the necessary implements of agriculture, or the tools of the mechanic, or articles of necessity in household furniture, shall, like wearing apparel, not be liable to execution on judgments. Regulations of this description have always been considered, in every civilized community, as properly belonging to the remedy, to be exercised or not, by every sovereignty, according to its own views of policy and humanity. It must reside in every State, to enable it to secure its citizens from unjust and harassing litigation, and to protect them in those pursuits which are necessary to the existence and well being of every community. *Bronson v. Kensie*, 1 How. 311, per TANEY, Ch. J.; *Rockwell v. Hubbel’s Admrs.*, 2 Doug. (Mich.) 197; *Quakenbush v. Danks*, 1 Denio, 128; 3 id. 594, and 1 N. Y. 129; *Morse v. Gould*, 11 id. 281; *Sprecker v. Wakeley*, 11 Wis. 432; *Cusic v. Douglass*, 3 Kan. 123; *Mazey v. Loyal*, 38 Ga. 531; *Hardiman v. Downer*, 39 id. 425. The increase

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in exemptions, however, must not go to the extent to render the remedy nugatory or impracticable. *Stephenson v. Osborne*, 41 Miss. 119. It has been decided that a homestead exemption may be made applicable to previously existing contracts. *Hill v. Kessler*, 63 N. C. 437; *Hardiman v. Downer*, 39 Ga. 425. 'Statutes pertaining to the remedy are merely such as relate to the course and form of proceedings, but do not affect the substance of a judgment when pronounced.' Per MERRICK, Ch. J., in *Morton v. Valentine*, 15 La. An. 153.

"And laws which change the rules of evidence relate to the remedy only; and while, as we have elsewhere shown, such laws may, on general principles, be applied to existing causes of action, so, too, it is plain that they are not precluded from such application by the constitutional clause we are considering. *Nease v. Mercer*, 15 Barb. 318. On this subject, see the discussions in the Federal courts, *Sturges v. Crowninshield*, 4 Wheat. 122; *Ogden v. Saunders*, 12 id. 213; *Bronson v. Kenzie*, 1 How. 311; *McCracken v. Hayward*, 2 id. 608. And it has been held that the legislature may even take away a common-law remedy altogether, without substituting any in its place, if another and efficient remedy remains. Thus, a law abolishing distress for rent has been sustained as applicable to leases in force at its passage. *Van Rensselaer v. Snyder*, 9 Barb. 302, and 13 N. Y. 299; *Guild v. Rogers*, 8 Barb. 502; *Conkey v. Hart*, 14 N. Y. 22. And it was also held that an express stipulation in the lease, that the lessor should have his remedy, would not prevent the legislature from abolishing it, because this was a subject concerning which it was not competent for the parties to contract in such a manner as to bind the hands of the State. In the language of the court, 'If this is a subject on which parties can contract, and if their contracts, when made, become, by virtue of the constitution of the United States, superior to the power of the legislature, then it follows, that whatever at any time exists as part of the machinery for the administration of justice, may be perpetuated, if parties choose so to agree. That this can scarcely have been within the contemplation of the makers of the constitution, and that if it prevail as law it will give rise to grave inconveniences, is quite obvious.' Every such stipulation is in its own nature conditional upon the lawful continuance of the process. The State is no party to their contract. It is bound to afford

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adequate process for the enforcement of rights, but it has not tied its own hands as to the modes by which it will administer justice. Those from necessity belong to the supreme power to prescribe, and their continuance is not the subject of contract between private parties. In truth, it is not at all probable that the parties made their agreement with reference to the possible abolition of distress for rent. The first clause of this special provision is, that the lessor may distrain, sue, re-enter or resort to any other legal remedy; and the second is, that in cases of distress the lessee waives the exemption of certain property from the process, which by law was exempted. The waiver of exemption was undoubtedly the substantial thing which the parties had in view; but yet, perhaps, their language cannot be confined to this object, and it may, therefore, be proper to consider the contract as if it had been their clear purpose to preserve their legal remedy, even if the legislature should think fit to abolish it. In that aspect of it, the contract was a subject over which they had no control.' *Conkey v. Hart*, 14 N. Y. 30; citing *Handy v. Chatfield*, 23 Wend. 35; *Mason v. Haile*, 12 Wheat. 370; *Stocking v. Hunt*, 3 Denio, 274; and *Van Rensselaer v. Snyder*, 13 N. Y. 299."

If this reasoning and this authority do not fully and beyond a doubt settle this question, we confess we are yet in gross ignorance of the true interpretation of the constitution of the United States, and of the powers of the several State legislatures under their constitutions.

For the reasons herein given, the judgment of the district court is reversed, and the cause remanded.

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 MERCHANTS' MUTUAL INSURANCE Co., appellant, v. LACROIX.
 

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(35 Texas, 242.)

*Insurance — condition in policy — limitation of time for bringing action.*

A policy of fire insurance contained a condition that "all claims under this policy are barred, unless prosecuted within one year from the date of the loss." *Held*, (1) that the condition was valid and binding; (2) that a presentation of the loss and a demand of payment were not such a prosecution of the claim as to satisfy the condition, but that an action must be brought within the time limited.

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**ACTION** on a policy of insurance. The opinion states the case.

*Ballinger, Jack & Mott*, for appellant. The clause requiring the action to be brought within one year is valid. 2 Parsons' Maritime Law, 401; *Cray v. Hartford Ins. Co.*, 1 Blatch. 280; *Riddlesbarger v. Hartford Ins. Co.*, 7 Wall. 386, 391, and cases cited; *Ripley v. Aetna Ins. Co.*, 30 N. Y. 136; *Roach v. N. Y. & E. Ins. Co.*, id. 546; *Woodbury Savings Bank v. Charter Oak Ins. Co.*, 31 Conn. 518; *Patrick v. Farmers' Ins. Co.*, 43 N. H. 631; *Carter v. Humboldt Fire Ins. Co.*, 13 Iowa, 287; *Portage Co. Mut. Ins. Co. v. West*, 6 Ohio St. 602.

*M. C. Lemore & Hume*, for appellee.

WALKER, J. This is an action on a policy of insurance, which contained the following clause: "That all claims under this policy are barred unless prosecuted within one year from the date of loss."

The petition was filed on the 3d of November, 1868, and it avers that the loss occurred on the 11th of August, 1867.

The appellant, who was defendant in the District Court, demurred to the petition on the 11th of December, 1868. On the 5th of January, 1869, it filed an amended answer, setting up a special limitation of the action under the seventeenth clause of the policy sued on. On the trial the parties waived a jury, and proceeded to trial by the court. The judge overruled the demurrer, disregarded the plea of limitation, and gave the appellee a judgment for \$2,178, from which judgment an appeal is brought to this court.

It is assigned for error, that the plea of limitation was overruled, and although other errors are assigned, we deem it unnecessary to the decision of the case to discuss them. In *Riddlesbarger v. Hartford Ins. Co.*, 7 Wall. 386, this question was decided on error to the Circuit Court of Missouri. The suit was on a \$5,000 policy, taken by the defendant on a brick building in Kansas City, in the State of Missouri. The building was destroyed by fire in the month of March, 1862. In the month of June following, the plaintiff brought his action on the policy in the Common Pleas Court of Kansas City. The defendant plead to the merits, and the cause was continued from term to term, until June, 1864, when the plaintiff dismissed his action without prejudice, and within one year brought his action for a second time in the Court of Common Pleas of the county of St. Louis. From this court the cause was transferred to

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the Circuit Court of the United States for the District of Missouri. The policy contained the following clause:

"That no suit or action of any kind against said company for the recovery of any claim upon, under, or by virtue of the said policy, shall be sustainable in any court of law or chancery, unless such suit or action shall be commenced within the term of twelve months next after the loss or damage shall occur; and in case any suit or action shall be commenced against said company after the expiration of twelve months next after such loss or damage shall have occurred, the lapse of time shall be taken and deemed as conclusive evidence against the validity of such claim thereby so attempted to be enforced."

The plaintiff here contended that he had kept his action alive by commencing suit in the Kansas City Court.

The statute of limitations of Missouri provides that if the plaintiff is nonsuited in any action brought before the right is barred, he may commence his action over again within one year from the date of nonsuit. The defendant demurred to the petition, the Circuit Court sustained the demurrer, and the case was taken, on error, to the Supreme Court of the United States, where it appears, from the opinion delivered by Mr. Justice FIELD, that the court considered and decided two important questions, which are also raised in the case at bar.

1. Whether a contract for special limitation between insurer and insured must be regarded as a valid contract.

2. Whether, if valid, the condition was complied with under the limitation laws of Missouri.

The learned judge, considering the second question presented, remarks: The objection to the condition is founded upon the notion that the limitation it prescribes contravenes the policy of the statute of limitations. This notion arises from a misconception of the nature and object of statutes of this character. They do not confer any right of action. They are enacted to restrict the period within which the right, otherwise unlimited, might be asserted. They are founded upon the general experience of mankind, that claims which are valid are not usually allowed to remain neglected. The lapse of years without any attempt to enforce a demand creates, therefore, a presumption against its original validity, or that it has ceased to subsist. This presumption is made by these statutes a positive bar; and they thus become statutes of repose.



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protecting parties from prosecution of stale claims, when, by loss of evidence from death of some witnesses, and the imperfect recollection of others, or the destruction of documents, it might be impossible to establish the truth. The policy of these statutes is to encourage promptitude in the prosecution of remedies. They prescribe what is supposed to be a reasonable period for this purpose; but there is nothing in their language or object which inhibits parties from stipulating for a shorter period within which to assert their respective claims."

This reasoning applies well to the present case. Such a contract in a policy of insurance is not against public policy, nor is it merged in the general limitation laws of the State.

The plaintiff's right of action is not saved by the forty-third section of the twelfth article of the constitution of 1869, nor is it in any way affected by the case of *Bender v. Crawford*, decided by this court at the present term. The authorities cited in appellant's brief are so numerous that we will not refer to them, except to say, that they utterly preclude all doubt upon the question herein raised, notwithstanding the very respectable authority found in 9 Ind. 443, and 5 McL. 461.

It is contended by the appellee's counsel that the word "prosecuted," used in the seventeenth clause of the policy sued on, should be understood as meaning something other than *lis mota*, and that the clause in the policy was sufficiently complied with by presentation of the loss, and demand of payment.

It is true the word "prosecution" usually denotes the means adopted to bring offenders to legal punishment; but that it may be used, and often so is, as synonymous with the words *suit* and *action*, there can be no doubt; and the similarity of the clause under consideration with like limitations in other policies which have been before the courts for adjudication, leaves no doubt upon our minds that the parties to this policy use the word as equivalent to *suit* or *action*.

We are, therefore, of the opinion that the failure of the appellee to bring his action within one year from the date of loss is an effectual bar to all actions on his policy.

The judgment of the district court is reversed and the cause dismissed.

**ENGLISH, appellant, v. STATE.**

(35 TEXAS, 472.)

*Constitutional law — Right to bear arms.*

A State statute regulating and in certain cases prohibiting the carrying of pistols, dirks, and certain other deadly weapons, is not repugnant to the second amendment to the Constitution to the United States, which provides that "a well-regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed;" nor is the act in violation of the thirteenth section of the first article of the Constitution of this State, which provides that "every person shall have the right to keep and bear arms in the lawful defense of himself or the State, under such regulations as the legislature may prescribe."

The "arms" referred to in the second amendment of the United States Constitution are the arms of a militiaman or soldier, and they do not comprise dirks, bowie knives, etc., regulated by the legislature in the act of April 12, 1871.

The powers of government are intended to operate upon the civil conduct of the citizen; and whatever conduct offends against public morals or public decency comes within the range of legislative authority. (*See note, p. 380.*)

**APPEAL** from the district court of Marion county.

Some reference to the facts of the cases may add practical significance to the rulings.

In English's case the offensive weapon was a pistol, and it was proved that he was in a state of intoxication while wearing it about in the city of Jefferson. He proved, in defense, that the pistol was not loaded at the times it was seen by the witnesses against him; and further, that it was out of repair, and he had taken it along with him to have it mended, as he expected soon to go to a neighboring county after his mother, and wished to carry the pistol with him.

The charge against Daniels was going "into a religious assembly, having about his person a butcher knife." The State's witnesses proved that they saw the defendant in church on the occasion in question, and that the handle of a butcher knife was sticking out above the waistband of his breeches, and between the skirts of his frock coat. They saw nothing but the handle. The court below charged that the handle raised a presumption of a blade.

*R. A. Reeves*, for appellant.

*William Alexander*, Attorney-General, for the State.

WALKER, J. In each of the above-entitled cases the constitutionality of the act of April 12, 1871, regulating, and in certain cases prohibiting, the carrying of deadly weapons, is called in question, and this opinion will dispose of each of the cases. It is insisted that the act referred to is repugnant to the second article of the amendments to the Constitution of the United States.

The article reads as follows: "A well-regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed." Arms of what kind? Certainly such as are useful and proper to an armed militia. The deadly weapons spoken of in the statute are pistols, dirks, daggers, slungshots, sword canes, spears, brass knuckles and bowie knives. Can it be understood that these were contemplated by the framers of our bill of rights? Most of them are the wicked devices of modern craft. Mr. Bishop, in his work on Criminal Law, vol. 2, 124,\* treats this article of the Constitution in the following manner:

"The Constitution of the United States provides that 'a well-regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed.' This provision is found among the amendments; and, though most of the amendments are restrictions on the general government alone, not on the States, this one seems to be of a nature to bind both the State and National legislatures, and doubtless it does.

"As to its interpretation, if we look to this question in the light of judicial reason, without the aid of specific authority, we shall be led to the conclusion that the provision protects only the right to 'keep' such 'arms' as are used for purposes of war, in distinction from those which are employed in quarrels and broils, and fights between maddened individuals, since such only are properly known by the name of 'arms,' and such only are adapted to promote 'the security of a State.' In like manner the right to 'bear' arms refers merely to the military way of using them, not to their use in bravado and affray. Still the Georgia tribunal seems to have held that a statute prohibiting the open wearing of arms upon the

\* This paragraph is omitted from the fifth edition of Mr. Bishop's Criminal Law, and is incorporated in his work on Statutory Crimes, § 702. — RAR.

person violates this provision of the Constitution, though a statute against the wearing of the arms concealed does not. And, in accord with the latter branch of this Georgia doctrine, the Louisiana court has laid it down that the statute against carrying concealed weapons does not infringe the constitutional right of the people to keep and bear arms; for this statute is a measure of police, prohibiting only a particular mode of bearing arms, found dangerous to the community."

Mr. Bishop goes on to remark that the same provision is found in the constitutions of several of the States, and refers to various authorities. *Owen v. The State*, 31 Ala. 387, and *Cochran v. The State*, 24 Texas, 394. We do not think the latter case is aptly cited; the question was not fairly before the court in *Cochran v. The State*. Mr. Bishop says: "The doctrine as laid down in *The State v. Buzzard*, 4 Ark. 18, is the doctrine generally approved by the American authorities," and cites *Aymette v. The State*, 2 Humph. 154; *The State v. Reid*, 1 Ala. 612; *The State v. Mitchell*, 3 Blackf. 229; *The State v. Newson*, 5 Ired. 250. Blackstone says, the offense of riding or going round with dangerous or unusual weapons is a crime against the public peace, by terrifying the good people of the land. And it was an offense prohibited by the statute of Northampton (2 Edward III, ch. 2), upon pain of forfeiture of the arms, and imprisonment during the king's pleasure. In like manner, as by the laws of Solon, every Athenian was fineable who walked about the city in armor. This was also an offense by the early common law of England. See *Knight's case*, 4 Mod. 117.

To refer the deadly devices and instruments called in the statute "deadly weapons," to the proper or necessary arms of a "well-regulated militia," is simply ridiculous. No kind of travesty, however subtle or ingenious, could so misconstrue this provision of the Constitution of the United States, as to make it cover and protect that pernicious vice, from which so many murders, assassinations, and deadly assaults have sprung, and which it was doubtless the intention of the legislature to punish and prohibit. The word "arms," in the connection we find it in the Constitution of the United States, refers to the arms of a militiaman or soldier, and the word is used in its military sense. The arms of the infantry soldier are the musket and bayonet; of cavalry and dragoons, the sabre, holster pistols and carbine;

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of the artillery, the field piece, siege gun, and mortar, with side arms.

The terms dirks, daggers, slungshots, sword canes, brass knuckles and bowie knives, belong to no military vocabulary. Were a soldier on duty found with any of these things about his person, he would be punished for an offense against discipline.

The act referred to makes all necessary exceptions, and points out the place, the time and the manner in which certain deadly weapons may be carried as means of self-defense, and these exceptional cases, in our judgment, fully cover all the wants of society. There is no abridgment of the personal rights, such as may be regarded as inherent and inalienable to man, nor do we think his political rights are in the least infringed by any part of this law.

It will doubtless work a great improvement in the moral and social condition of men, when every man shall come fully to understand that, in the great social compact under and by which States and communities are bound and held together, each individual has compromised the right to avenge his own wrongs, and must look to the State for redress. We must not go back to the state of barbarism in which each claims the right to administer the law in his own case; that law being simply the denomination of the strong and the violent over the weak and submissive.

It is useless to talk about personal liberty being infringed by laws such as that under consideration. The world seems to have seen too much licentiousness cloaked under the name of natural or personal liberty; natural and personal liberty are exchanged, under the social compact of States, for civil liberty.

The powers of government are intended to operate upon the civil conduct of the citizen; and whenever his conduct becomes such as to offend against public morals or public decency, it comes within the range of legislative authority. How far the functions of police may be extended to govern the conduct of men — how far personal liberty may be restrained for the prevention of crime, are nice questions; yet, says one of the ablest thinkers of modern times, John Stuart Mill, in his work on "Liberty," pages 56 and 57, "It is one of the undisputed functions of government, to take precautions against crime before it has been committed, as well as to detect and punish it afterward. The right inherent in society, to ward off crimes against itself by antecedent precautions, suggests

the obvious limitations to the maxim, 'that purely self-regarding misconduct cannot properly be meddled with in the way of prevention or punishment.'"

It is furthermore claimed that this is a law in violation of the thirteenth section, first article, of our own constitution, which reads thus: "Every person shall have the right to keep and bear arms in the lawful defense of himself or the State, under such regulations as the legislature may prescribe."

We understand the word "arms," when used in this connection, as having the import and meaning which it has when used in the amendment to the Federal constitution.

Our constitution, however, confers upon the legislature the power to regulate the privilege. The legislature may regulate it without taking it away;—this has been done in the act under consideration. But we do not intend to be understood as admitting for one moment, that the abuses prohibited are in any way protected either under the State or Federal constitution. We confess it appears to us little short of ridiculous, that any one should claim the right to carry upon his person any of the mischievous devices inhibited by the statute, into a peaceable public assembly, as, for instance, into a church, a lecture room, a ball room, or any other place where ladies and gentlemen are congregated together.

It is not our purpose to make an argument in justification of the law. The history of our whole country but too well justifies the enactment of such laws. This law is not peculiar to our own State, nor is the necessity which justified the enactment (whatever may be said of us to the contrary) peculiar to Texas. It is safe to say that almost, if not every one of the States of this Union have a similar law upon their statute books, and, indeed, so far as we have been able to examine them, they are more rigorous than the act under consideration. Other older States have been better able to carry out these laws than we have yet been, and the laws perhaps themselves have been less repugnant to the people of those States, than our law has been to a class of our own people. But a law is not to be set aside because it may be repugnant to the wishes, or distasteful to a class of the community, for it is generally to that class that the law is more especially addressed. Were such a rule to obtain in civilized States, it would operate a revocation of all legislative functions; the mob would assume to declare what should be law and what should not. There could be no reformation of

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evils in society. Communities and States would degenerate just in proportion as their laws were wise and wholesome, or foolish and immoral. The law under consideration has been attacked upon the ground that it was contrary to public policy, and deprived the people of the necessary means of self-defense; that it was an innovation upon the customs and habits of the people, to which they would not peaceably submit. We do not think the people of Texas are so bad as this, and we do think that the latter half of the nineteenth century is not too soon for christian and civilized States to legislate against any and every species of crime. Every system of public laws should be, in itself, the purest and best system of public morality. We will not say to what extent the early customs and habits of the people of this State should be respected and accommodated, where they may come in conflict with the ideas of intelligent and well-meaning legislators. A portion of our system of laws, as well as our public morality, is derived from a people the most peculiar, perhaps, of any other in the history and derivation of its own system. Spain, at different periods of the world, was dominated over by the Carthaginians, the Romans, the Vandals, the Suevi, the Allani, the Visigoths, and Arabs; and to this day there are found in the Spanish codes traces of the laws and customs of each of these nations blended together into a system by no means to be compared with the sound philosophy and pure morality of the common law.

Nations, in their transitions from one form of government to another, are full as apt to retain what is bad in the old, as to adopt what is good in a new system. The object and purpose of all law should be the promotion and advancement of the happiness and well being of the people upon whom the law is to operate.

We are far from believing that the ultimate results of the law under consideration will not be beneficial to the people of the State. But however much we might desire to sustain the law on the grounds of public policy and expediency, such is not our reason for sustaining it. We sustain it because it is the law of the land, and in our judgment in conflict with no higher law. In the case of *The State v. Carter*, No. 639, the judgment of the district court is reversed and the cause remanded; in *English v. The State*, No. 590, the judgment of the district court is affirmed; and in *Daniels v. The State*, the same entry.

*Ordered accordingly.*

## Angell v. The State.

*NOTE.*—See *Andrews v. State*, 8 Am. Rep. 8, wherein the Supreme Court of Tennessee held that a statute prohibiting the carrying publicly or privately of a "dirk, sword-cane, Spanish stiletto, belt or pocket pistol or revolver, was constitutional, except as to the revolver. The question was considered at great length in that case and with great ability.

The question first arose in *Biles v. Commonwealth*, 2 Litt. 90, wherein the Supreme Court of Kentucky held a statute "to prevent persons wearing concealed weapons" unconstitutional as an infringement of the constitutional right to bear arms. The court said that any restraint upon that right, whether prohibiting the wearing of *concealed* weapons or exposed weapons, was alike illegal.

But in *State v. Reid*, 1 Ala. 612, it was held that the constitutional provision that "every citizen has the right to bear arms in defense of himself and the State" was not infringed by a statute prohibiting the carrying of *concealed* weapons; or in other words, that the legislature had the right to regulate the *manner* of carrying the arms. In harmony with this decision are *Owen v. State*, 31 Ala. 387; *Nunn v. State*, 1 Kelly (Ga.), 243; *Stockdale v. State*, 33 Ga. 235; *State v. Buzzard*, 4 Ark. 18; *State v. Mitchell*, 3 Blackf. 220; *State v. Jumei*, 13 La. An. 399; *State v. Smith*, 11 id. 653; *State v. Chandler*, 5 id. 469; *Aymette v. State*, 2 Humph. 154.

The question as to the kind of arms which the constitution authorizes to be borne is very ably considered in the case last above cited, and also in *Andrews v. State*, *supra*. In the former case GREEN, J., says: "As the object for which the right to keep and bear arms is secured, is of a general and public nature to be exercised by the people in a body for their common defense, so the arms the right to keep which is secured, are those which are usually employed in civilized warfare, and that constitute the ordinary militia equipment;" and a statute against wearing "a bowie-knife or Arkansas tooth-pick" concealed about the person was sustained, and this case was cited and affirmed in *Andrews v. State*.

On the question as to whether the provision in the federal constitution as to the right to bear arms is a restriction upon the States, Mr. Bishop says: "Though most of the amendments are restrictions on the general government alone, not on the States, this one seems to be of a nature to bind both the State and the national legislatures, and doubtless it does." The Supreme Court of Georgia held the same view in *Nunn v. State*, 1 Kelly, 243, and in *Stockdale v. State*, 33 Ga. 235; and the same was conceded in Louisiana, *State v. Jumei*, 13 La. An. 399. See, also, *State v. Buzzard*, 4 Ark. 18. — *REP.*

## ANGELL v. THE STATE.

(35 Texas, 542.)

*Murder -- resisting arrest.*

When a party resisting arrest attempts to kill the officer, while the latter in the line of his duty is making the arrest, but by accident kills a third person, the killing is murder.

THE facts of the case are sufficiently stated in the opinion of the court.

No brief for the appellants reached the hands of the reporter.

Wm. Alexander, Attorney-General, for the State.



*Angell v. The State.*

OGDEN, J. That sheriffs, constables and conservators of the peace generally, while in the lawful discharge of their official duties, are under the peculiar protection of the law, there can be no doubt. A policeman under our law is a conservator of the peace, and is entitled to the same protection in the execution of his duty as sheriffs and constables. Russ. on Crimes, vol. 1, p. 533; 2 Whart. Crim. Law, 1031. The rights of every citizen in the community require it, and the public peace and tranquillity demand it. It is the especial duty of all officers of that class to interpose their official authority to prevent crime of every character, and to preserve the peace of society; and the law in imposing this duty upon them has also conferred upon them the necessary authority and privileges to the full execution of their peculiar duty, and it punishes with increased severity all assaults upon such officials while in the lawful discharge of their duty, and every interference or resistance to their lawful authority. 2 Bish. Crim. Law, 918.

A constable or policeman is authorized to arrest a person who, in a fit of drunkenness, by loud noise, or otherwise, is disturbing the peace of society; and if in the attempt at making the arrest, the officer is resisted and killed, the killing is murder (1 Russ. on Crimes, 532, 592; Whart. Am. Crim. Law, 1042; Archb. Crim. Pr. 29); and if, in the attempt to kill the officer making the arrest, a third person is killed by accident, it is murder. 1 Russ. on Crimes, 532, 592; Whart. Am. Crim. Law, 1031. Indeed, it is laid down as a general rule, that if a man, designing to kill another, kills by mistake a third person, the killing of such third person is murder. Whart. Am. Crim. Law, 997.

In the case at bar there is no denial that the defendant had been drinking, and was laughing and talking and making a noise on the streets of the city of Marshall at night, and bleating like a goat; that Poland, the chief of police, and Thompson, a policeman, attempted to arrest the defendant, who resisted, and drawing a pistol, threatened to blow a hole through Poland. About this time other persons came up, one of whom took hold of defendant. A scuffle ensued, during which defendant drew his pistol and fired, killing his friend, Harris; and one of the witnesses testified that when Harris fell, defendant said he thought he was shooting Poland. It appears from the testimony that Thompson saw the defendant, just before the attempted arrest, in a grocery with Cox, and from their conversation he apprehended a difficulty, and that

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he heard defendant bleating like a goat, and informed Poland of those facts, who went with him to assist in making the arrest. There can be no doubt that under these circumstances it was the duty of Thompson and Poland to arrest the defendant, and his resistance was a violation of the law, and now the law will hold him responsible for the consequences.

We think the law applicable to the facts proven was clearly presented to the jury in the charge of the court. And upon the facts and the law the jury found the defendant guilty of murder in the second degree, and assessed his punishment at five years in the penitentiary; and we are not prepared to say that their verdict is contrary to the law or the facts of the case, or that the punishment assessed is excessive. The judgment is therefore affirmed.

*Judgment affirmed.*

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**JONES, appellant, v. KEITH.**

(37 Texas, 388.)

*Highway — bridge over stream — compensation to riparian owner.*

A state legislature has power to authorize the erection of a toll-bridge at the crossing of a stream by a public highway, without compensation to the riparian owners; and it is immaterial that the riparian owners are operating a ferry at the crossing, the value of which will be impaired by the bridge. A bridge spanning a stream at the crossing of a highway and within the limits of a highway, is a part of the highway, and is not such a new servitude on the lands as to enable the riparian proprietors to compensation.

SUIT for an injunction to restrain H. W. Jones from building a toll-bridge across the Sulphur Fork of Red river. The opinion states the case.

*B. W. Gray and W. J. Sparks, for appellant.*

*Culberson & Mabry and Dellahanty & Mitchell, for appellees.*

WALKER, J. The appellees have enjoined, in the District Court, the appellant from building a toll-bridge across the Sulphur Fork of Red river. They allege in their petition that they are the owners in fee of the land on both banks of the river, where the

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appellant proposes to erect the bridge, and that the appellant has no right to build the bridge at the place designated and known as McCrury's Crossing.

The appellant, in his answer, pleads an authority under a special act of the legislature, granting to him and his associates a franchise to construct and keep up a toll-bridge, for the period of twenty-five years, at the point designated; and further, that for a period of more than twenty years prior to the filing of the petition, a public highway had been authorized and dedicated, and had been kept up by the counties of Titus and Red River, which crossed the stream at the point designated in his charter; and that, at the November term, 1850, of the Commissioner's Court of Titus county, there was a charter granted to one John Becknell, for a toll-bridge, which was built and kept up by said Becknell until the expiration of his charter, which was limited to ten years. Said bridge was built across the stream, and formed a part of the public highway at the McCrury Crossing, and that said Becknell never obtained a renewal of his franchise, nor has any been granted to any other person or persons, except that granted to him and his associates by special act of the legislature, passed April 12th, 1871; and that the bridge built by Becknell, and kept up by him as a toll-bridge, has long since been suffered to fall into decay, and is no longer used by the public as a means of crossing the stream.

The appellant also denies every charge of trespass upon the lands of the appellees; and having fully answered the petition, the court refused to dissolve the injunction. The case is appealed to this court.

The opinion of the district judge is copied into the record, and shows the ground assumed by the learned judge, in deciding the case. He evidently places his decision upon the authority of *Williams v. N. Y. C. R. R. Co.*, 16 N. Y. 97. We do not think this case, although good law, can have the slightest application to the case at bar. Doubtless, had the legislature, by the act of April 12th, 1871, imposed any new servitude upon the lands of the appellees, they, being the undoubted owners of the fee, would, under our Constitution, be entitled to compensation in money for their land, before the appellant would have the right to construct a bridge under the charter granted to him and his associates.

Where a railroad takes the place of an ordinary road-bed, the current authorities hold it to be a new servitude, and before the

State, exercising its right of eminent domain, can impose such new servitude, the owners of the fee may demand compensation. But the appellant does not propose to build a railroad on the bed of the old county road, nor to do any thing more than bridge the stream which intersects the road, and thus make his bridge part and parcel of the common highway, for which the public have long since gained an easement.

The legislature is, in a proper sense, the guardian of the public, and there can be no doubt of the right, power and duty of that branch of the government, as well as every other branch, to improve and promote the public interest, wherever the same can be done without the violation of private rights.

The owners of the fee in the land long since dedicated to the public use have no better right to interfere with the public easement than any other person would have ; and if the legislature had done no more than grant the appellant the right to improve, and render more serviceable to the public the right of travel thus acquired, they have only exercised their legitimate power, and one of which the appellees have no right to complain.

It is not beyond the power of the legislature to revoke a license to keep a ferry, or to impair a ferry privilege by granting a charter to build a bridge where ferries have been kept. If it were, there would be but little chance of a country improving its facilities for traveling, or doing away with primitive expedients by more safe and commodious means of crossing the stream of a country. The man who had a right to keep a flat-boat ferry, granted, perhaps, at a time when it was a great public benefit to have it, might hold populous communities, large towns and cities, in very vassalage to his ferry, and utterly prevent the public from resorting to other modes of crossing the stream ; but, fortunately, the right of eminent domain is reserved to the States, and private property may be condemned to public use.

It is true, as it should be, the right of the owner must be respected, and he must be paid in all ordinary cases for his property. But in this case it is admitted that, since the year 1850, the public have had and enjoyed the use of a highway crossing the Sulphur at the point where the appellant now proposes to build his toll-bridge, and the presumption is that the easement is long since unincumbered by private rights.

We think the constitutional right of the legislature to grant the

franchise in question, can no longer be doubted. Mr. Angell, in his work on Highways, paragraphs 40 and 41, says: "A public bridge being a highway, it follows that those principles of the common law which relate to highways in general are alike applicable to public bridges; but although the principles are the same, yet, from a difference in the nature of the respective objects of their observation, their reduction to practice in the one case varies from that of the other.

"A common way may, with the consent of the proprietor, be at once subject to general user, without any antecedent act to bring it into existence; but a bridge must have been erected before it can be traversed; and this distinction is the foundation of all the difference between the two cases.

"The term *highway* does not import a bridge; and in any case where there is an occasion to notice any of the differences which exist between highways generally, and bridges, it is indispensable that the difference should be marked by terms appropriate to each. So that, if a party is to be charged with neglect to build or repair a bridge, it must be by the term 'bridge,' which alone describes such a structure."

The only comment necessary to be made on the text of the learned author, in its application to the case at bar, is this: The antecedent act necessary to a dedication of the highway in question, and the privilege of erecting a toll-bridge at the McCrury Crossing, is found in the proceedings of the Commissioners' Court at the November term, 1850, wherein is not only found the dedication of the road, but the grant of a charter to John Becknell, to erect and keep up a toll-bridge upon it for the limited term of ten years.

But the learned author already quoted from proceeds to say: "No State Constitution, it is believed, gives the legislature in terms a right to make bridges, but such power has always been exercised, and no one doubts the legislative power to make such grants. An act of the legislature, authorizing the erection of a bridge over navigable water within the limits of the State, is clearly constitutional."

And here reference is made in the notes to very numerous authorities running through most of the older States. The author makes a comment upon the argument of counsel in the case of the *Commonwealth v. Breed*, 4 Pick. 460, where it was objected that the

grant to build the bridge was upon the petition and for the benefit of a single individual ; to which the court in reply said : "This was doubtless true ; and it was also true that many other enterprises had originated in motives of private gain, which had resulted in great public improvements."

This idea is germane to our case. The appellees claim a right to a ferry privilege, and insist that this privilege is valuable to them, and that they ought not to be deprived of it by the legislature granting to another a right which must impair the value of their privilege. This is an argument which the legislature doubtless would have considered unanswerable, if no other rights or interest than those of the parties to this suit were in question. But the legislature doubtless considered that the public had a right to have the streams bridged and the highways improved in the most effectual manner consistent with the rights of individuals. An easement having been acquired by the public in a road crossing the Sulphur at the point in question, not only for a road but for a bridge, and no new servitude being imposed upon the dedication, the riparian owners of the stream have no right to interfere with the construction of a toll-bridge at the point indicated. It may be argued that, because the bridge is to be a toll-bridge, that this in itself imposes a new servitude ; but this is not true in law or in fact. A toll-bridge has been kept for a term of years across this stream at the place where it is now proposed to build another. A toll-bridge is, to all intents and purposes, in this case, a part of the public road. Ordinary roads are improved and kept up by some system of taxation. The legislature, by granting the right to individuals, on condition of their building and keeping up a road or bridge, but changes the character of the tax. But every man who pays his toll upon a toll-road or bridge has as unrestricted and unqualified a right to travel the road or bridge, as if it were free from toll, and he paid his tax in the ordinary way.

Were we disposed to present authorities in support of this opinion, in numbers such as might be brought forward, our opinion would assume the volume of a compilation. A few of the leading authorities only will be referred to. The case of *Chagrin Falls Plank Road Co. v. Cane*, 2 Ohio St. 419, is a remarkably well-considered case, decided in an opinion delivered by one of the ablest jurists of that State. It announces the same doctrine, though much more elaborately stated, which is laid down by the Supreme Court of

New York in the case of *Benedict v. Goit*, 3 Barb. 449, and in the case of *Commissioners of Highways*, 16 Barb. 337.

In the Ohio case it was held that the interest of the public, in a highway under perpetual easement, might, in the discretion of the legislature, be transferred, without any money equivalent, to a plank-road company — the latter still being a public highway, and subject to the same uses and purposes as under the former dedication; and in such instances the corporation becomes the assignee of the public.

In the case referred to in 16 Barb., being very similar to the Ohio case, the court says, where a plank-road or a turnpike is constructed along a highway, the company succeeds to the rights and powers of the commissioners of highways.

In the case of 3 Barb., the court held that a turnpike is a highway, and the legislature has power to construct and control the highways in such mode and manner as in their judgment may be required; and the interest of the turnpike company in the easement is that which the public before had.

It can scarcely be denied that the legislature would have the right to cause a free bridge to be built across the stream here in question. Is the power to grant to individuals the right to construct a toll-bridge more questionable? We think not. Redfield, in his work on Railways, vol. 1, pp. 297 and 298, discussing analogous questions to that presented in this case, says: "The decisions are contradictory in regard to the right of a railway company to lay its track along a common highway, without making additional compensation to the land owners adjoining such highway. In some of the earlier cases upon this subject, it seems to have been considered that, under such circumstances, the land owners were entitled to additional compensation, when the land was converted from a common carriage-way to a railway."

The reason given for these decisions by the learned author is certainly a good one — that the owner's entire interest should be assessed at once, and this could not be understandingly done unless the use to which it was applied were known to the assessors.

Perhaps an additional reason worthy of respect might be given, at least in some of the States, where the commissioners are allowed to consider benefits resulting to the land owners, and offset them against damages. The land owners might be greatly benefited by an ordinary highway, upon which every man may travel in his own

vehicle, which, if changed to a railway, compels the public to travel in the mode provided by the company. There is, indeed, in such cases so essential a change in the servitude, that in our view the original servitude should be held to be abandoned, and the rights of the owner in fee to revert.

But the same learned author, in vol. 1, p. 304, says it was long since settled that the land owners were not entitled to any additional damage by reason of any alteration in the construction of the highway, or in applying it to the use of a turnpike road where toll was paid, this being but a different mode of supporting the highway; of which the land owner had no just cause of complaint, since it did not materially alter the use of the land, and the same rule has now been pretty extensively extended to improvements in erecting railways along the streets and highways. The true principle undoubtedly is, that if the use is substantially as that of an ordinary highway, no additional compensation can be required.

We are of opinion that the court below misjudged the law of this case, and that the injunction should have been dissolved. It is therefore dissolved by the judgment of this court, and the judgment of the District Court is reversed.

*Judgment reversed.*



CASES  
IN THE  
SUPREME COURT  
OF  
MISSOURI.

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LINN COUNTY V. FARRIS, appellant.

(22 Mo. 75.)

*Bond — execution by surety on condition that other sureties shall execute.*

Defendant signed a bond as surety on condition that the principal would also procure the signature of L. thereto as surety. L.'s signature was not obtained, but his name was forged to the bond. In a suit on the bond by the obligee, *held*, that the bond was void as to defendant.

ACTION by the county of Linn and the State of Missouri for the use of Linn county against W. C. Farris and others against the sureties upon an official bond. The opinion states the case.

*A. W. Mullins and G. D. Burgess*, for appellants.

*C. Boardman*, for respondent.

ADAMS, J. This suit was upon the official bond of the defendant Hoyle as treasurer of Linn county.

David Beals was sued as one of the sureties and died during the progress of the suit, and it was revived against the appellants as

his administrators. The administrators set up as a defense in their answer that their intestate, Beals, at the time he signed the bond, expressly agreed with the principal Hoyle that he, Hoyle, was to procure the signatures of Dart, Wright, Leavill, Maddox and Good to the bond, and that he was to retain the bond in his hand as an escrow, not to be delivered at all unless the other parties named also executed it as securities. That Hoyle never did procure the signature of Leavill, but that Leavill's name was signed thereto without his knowledge or consent, and that the bond was afterward delivered to Linn county without the knowledge or consent of their intestate, Beals.

This answer was, on the motion of plaintiff, stricken out, and exceptions were duly saved to this action of the court; and afterward final judgment was rendered against the appellants for want of answer, from which they have appealed to this court.

The defense set up in this answer amounts to a plea of *non est factum*. To constitute a valid execution of a bond, delivery with the intention that it shall be the bond of the obligor, is essential. This answer sets up a conditional delivery, not to the obligee, nor to any agent of the obligee, but to the principal in the bond, with the express condition that it was not to be the bond of Beals till the other parties named as sureties should duly execute it. This condition was not complied with in regard to Leavill.

From this answer the name of Leavill seems to have been forged, and as it was one of the conditions of the delivery that all of the named parties should execute it, the omission to procure the genuine signature of Leavill, or his assent to its executions, rendered the bond invalid as to the intestate. The true ground is that he has never executed the bond. One essential requisite to its due execution was wanting—an absolute delivery as the bond of the intestate. There was no delivery of this bond as the bond of the intestate.

When a principal, not acting as agent of a creditor, fraudulently procures the execution of a bond by sureties, the remedy of the sureties in such case is against the principal and not the creditor who did not participate in the fraud. But this is not that case. Here there was no valid execution of the bond at all. The delivery was conditional, and it could not become the bond of the surety till this condition was performed. *State ex rel. Moore v. Sandusky et al.*, 46 Mo. 377; *Gasconade county, etc. v. Sanders et al.*, 49 id.

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192; *Briggs v. Ewart*, 51 id. 245; *Cutter v. Whittemore*, 10 Mass. 442; *Pepper v. State*, 22 Ind. 399; *Bagot v. State*, 33 Ind. 262; *People v. Bostwick*, 43 Barb. 9; S. C., 32 N. Y. 445; *Pawling v. United States*, 4 Oranch, 219; *Duncan v. United States*, 7 Peters, 435; *United States v. Leffler*, 11 Peters, 86; *Seely v. People*, 27 Ill. 175.

Under this view the judgment must be reversed and the cause remanded. The other judges concur.

## HAMILTON v. MARKS, appellant.

(28 Mo. 73.)

*Bills and notes — defense to in hands of assignee.*

Actual or express notice to an assignee before maturity of a negotiable promissory note, of any infirmity or fraud in the execution or consideration, is not necessary to invalidate it in his hands; it will be sufficient that he have notice of circumstances that ought to put a prudent man on inquiry. (*See note, p. 898.*)

**ACTION** on a promissory note. The opinion states the case.

*A. W. Mullins*, for appellant.

*G. W. Easley*, for respondent.

**ADAMS, J.** This was an action on a promissory note, executed by the defendants, to one T. H. Cooley, and by Cooley assigned to plaintiff before maturity. The separate answers of the defendant Marks set up a conditional sale of a farm to him by Cooley, that the conveyance was made to him for the purpose of making the sale to one Walker, and that the note was executed simply to secure Cooley in the faithful discharge by Marks of the trust; and that in case no sale should be made to Walker before maturity of the note, the note was to be void.

This answer also set up a fraudulent conspiracy between Walker and Cooley to sell the farm to Marks, and charged the defendant with notice of the fraud, etc. The answer also set up what the consideration of the assignment was, and that it was not for value, etc.

The plaintiff replied, denying specifically all the material allegations of the answer.

Both parties gave evidence conducing to establish their respective sides of the case.

The jury found a verdict for the plaintiff for something less than the amount of the note, and a motion for a new trial was made and overruled.

The only point which we are called upon to review grows out of the instructions given for the plaintiff and the second instruction of defendant, refused by the court. The refused instruction reads: "The jury are instructed, that if they believe from the evidence that the note sued on was obtained by Cooley from the defendant Marks by fraud practiced upon him by said Cooley, then, in order to affect the plaintiff with such fraud, it is not necessary that he should have had actual and positive knowledge of such fraud, before the assignment of said note to him; but that is sufficient notice if it be such as men usually act upon in the ordinary affairs of life."

The objection urged against this instruction is, that the assignee of a negotiable note before maturity must have actual or express notice of any alleged infirmity or fraud in the execution or consideration of the note, and that circumstances which ought to put a prudent man on inquiry are not sufficient notice to invalidate the note in his hands.

Judge STORY in his work on Promissory Notes uses this language: "It is agreed on all sides, that express notice is not indispensable; but it will be sufficient if the circumstances are of such a strong and pointed character as necessarily to cast a shade upon the transaction, and to put the holder on inquiry." Story on Prom. Notes, § 197. This doctrine, as here laid down, was the established law of England for a long time, but recently the English courts have abandoned it, upon the alleged ground of its inconvenience, and its obstruction to the free circulation of negotiable paper. But in America the recent English rule has been denied and the old doctrine declared to be too long and firmly established to be now shaken or overruled.

In *Pringle v. Phillips*, 5 Sandf. (N. Y.) 157, Judge DUNKER in a very elaborate opinion reviews the cases of *Crook v. Jada*, 5 B. & Ad. 909; *Backhouse v. Harrison*, id. 1098; *Goodman v. Harvey*, 4 A. & E. 870, which overruled the prior English cases, and very

## Hamilton v. Marks.

clearly shows that the old doctrine has too solid a foundation in principle, to be now overturned or shaken by their recent English decisions. Whatever respect we may have for the learned tribunal by which those cases were decided, we think they ought not to be regarded as evidence of the law which the American courts are bound to follow.

We think the old doctrine is the better rule, and is supported by the weight of authority and reason both in England and America. See *Gill v. Gubitt*, 3 B. Cresw. 466; *Snow v. Peacock and others*, 3 Ring, 406; *Haynes v. Foster*, 4 Tyrw. 65; *Beckwith v. Corral*, 3 Bing. 444; *Snow v. Saddler*, id. 610; *Estrange v. Wigney*, 6 id. 677; *Easley v. Crockford*, 10 Ring, 243; *Wiggins v. Bush*, 12 Johns. 306; *Ayer v. Hutchins*, 4 Mass. 370; *Cone v. Baldwin*, 12 Pick. 545; *Hall v. Hale*, 8 Conn. 336; *Horne v. Karsper*, 5 Binn. 469; *Sandford v. Norton*, 14 Vt. 228; *Nicholson v. Patton*, 18 La. 213.

For these reasons we think the court erred in refusing the second instruction asked by the defendants, and the court also erred in the instructions given for the plaintiff, which required actual notice on his part of the alleged fraud or infirmity in the execution or consideration of the note.

The judgment will therefore be reversed and the cause remanded. The other judges concur.

*NOTE.* — *Gould v. Stevens* (43 Vt. 125), 5 Am. R. 265, is to the same effect as the above case, but the current of authority, both English and American, is the other way. See note to *Gould v. Stevens*; see, also, *Lake v. Reed* (39 Iowa, 265), 4 Am. Rep. 209; *Phelan v. Moss* (87 Penn. St. 59), 5 id. 402; *Magee v. Badger*, 34 N. Y. 247; *Belmont Branch Bank v. Hoge*, 35 N. Y. 66; *Matthews v. Poythress*, 4 Ga. 298; *Cooper v. Nock*, 27 Ill. 301; *Souther v. Martin*, 18 Iowa, 143; *Sadler v. White*, 14 La. An. 177.

The fact that the consideration of a note is expressed upon its face is not sufficient to put a bona fide purchaser on inquiry as to whether or not the consideration has failed. *Bank of Commerce v. Barrett*, 38 Ga. 126.

One who purchases a note at a discount exceeding the legal rate of interest, is not therefore bound to inquire as to its character. *Mechanics' Bank v. Foster*, 44 Bart. 87; 19 Abb. Ct. — Rep.

**NEWMYER, appellant, v. THE MISSOURI & MISSISSIPPI RAILROAD COMPANY.**

(22 Mo. 31.)

*Municipal corporations — actions to restrain illegal acts of. Parties.*

Owners of taxable property can maintain a suit to annul illegal acts of municipal officers when such acts will increase the municipal taxes, and the State is not a necessary party.

Bill filed by tax payers of a county on behalf of themselves and all other tax payers, to set aside an order of the county court making a subscription on behalf of the county to the capital stock of a railroad, and to have the same declared null and void on the ground that it was illegal. *Held*, that there was no defect of parties.

PETITION by J. S. Newmeyer and John B. Clark. The opinion states the case.

*James Carr*, for appellants. In case of misfeasance or malfeasance of officers of a municipal corporation a tax payer may bring suit on behalf of himself and other tax payers. *Hooper v. Ely*, 46 Mo. 505; *Steines v. Franklin County*, 48 Mo. 176; *Wood v. Draper*, 24 Barb. 187; *De Bavin v. Mayor*, 16 id. 392; *Stuyvesant v. Pearsall*, 15 id. 244; *Shepherd v. Wood*, 13 How. Pr. 42; 2 Redfield on Railways, 362; *Burt v. British Life Ins. Co.*, 5 Jur. (N. S.) 612; *Mandaville v. Riggs*, 2 Pet. 482; *Smith v. Swornstedt*, 16 How. 288; *Bacon v. Robertson*, 18 id. 480; *Dodge v. Woolsey*, id. 331; *Whitney v. Mayo*, 15 Ill. 251; *Sweet v. Hulbert*, 51 Barb. 312.

*R. T. Prewitt, Williams, Jones & Eberman and Chandler & Sherman*, for respondents, cited *Davis v. New York*, 2 Duer, 663; *Doolittle v. Supervisors*, 18 N. Y. 155; *Miller v. Grandy*, 13 Mich. 540; *People v. Regents*, 4 Mich. 98; *State v. Saline*, 51 Mo. 350; *Roosevelt v. Draper*, 23 N. Y. 318; *Barrows v. Davis*, 46 Mo. 394.

EWING, J. This was a petition in the nature of a bill of equity filed by the plaintiffs on behalf of themselves and all other citizens and tax payers who are similarly interested with themselves to set aside an order of the county court of Macon county making a subscription of \$175,000 to the capital stock of the Missouri & Mississippi Railroad Co., and to have the same declared null and void, and to

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have the bonds issued to pay said subscription delivered up and canceled. The bill alleges that plaintiffs were and are owners of a large amount of real estate and personal property situated in said county, and are tax payers on the same; that in 1867 the county court of Macon county subscribed \$175,000 to the capital stock of said railroad company without the assent of two-thirds of the qualified voters of said county, no election, regular or special, having been held for the purpose of obtaining said assent; that bonds of said county have issued to the amount of said stock, etc.; that in order to raise more money for said road, the further sum of \$175,000 was subscribed to the capital stock in 1870; that said last subscription was the result of a corrupt and fraudulent combination and arrangement between the railroad company and the county court, whereby the judges of the said court were to derive large pecuniary gains and advantages; that bonds were issued by said court in payment of said subscription and placed in the hands of defendants, Bartholow, Lewis & Co., bankers, for the purpose of having them negotiated to innocent purchasers for value without notice of the fraud by which said railroad had procured them. The bill further alleges the act authorizing said subscription is unconstitutional and void; that said subscription was made without authority of law, by collusion and in confederation with said railroad company and in fraud of the rights of the plaintiffs and other citizens and tax payers of said county, for private advantages and gain and to subserve the individual purposes and ends of said justices of the county court and other parties connected with them.

Defendants demurred to the petition on these grounds:

That the petition does not state facts sufficient to constitute a cause of action. There is a defect of parties plaintiff. There is a defect of parties defendant. Because plaintiffs do not show any such irreparable injury to themselves as to authorize the interposition of a court of equity. The court sustained the demurrer, the plaintiffs declining to file an amended petition, final judgment was rendered on said demurrer. The cause is here by appeal.

It seems not to be seriously questioned that upon the facts stated in the petition, which are of course admitted by the demurrer, the plaintiffs are entitled to the relief prayed for if they can maintain the action; and the only remaining question that we deem it proper to consider is, whether the plaintiffs as *tax payers* of Macon county have stated a title for the relief which they claim against

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defendants; in other words, whether as such tax payers they have such an interest in the subject-matter of the suit as entitles them to maintain this action. I am not aware that this question has ever been passed upon by this court. In the case of *Hooper v. Ely*, 46 Mo. 505, the plaintiff as a *tax payer* obtained an injunction against the treasurer to restrain him from paying a certain county warrant upon the ground that it was issued without authority of law, and also asked for an order upon the defendant, the holder, to bring it into court to be canceled. The only interest the plaintiff had in the subject-matter of the suit was that of a *tax payer* of the county, and his right to maintain it was unquestioned.

The only other case similar to the one at bar was that of *Steines v. Franklin County*, 48 Mo. 167, which was a petition in the nature of a bill in equity brought by the plaintiffs as citizens and tax payers of Franklin county, asking for a decree declaring a contract and certain orders of the county court of said county void, and requiring a cancellation and delivery of bonds issued under said contract and for an injunction restraining their payment, sale or transfer, and restraining the assessment, levy or collection of a tax for the purpose of their payment. No point was made as to the right of the plaintiffs as tax payers to maintain the action.

The grounds upon which such suits by tax payers have been held unmaintainable are, that it requires some individual interest distinct from that which belongs to every inhabitant of the town or county to give the party complaining a standing in court, where it is an alleged delinquency in the administration of public affairs which is called in question; and that the ownership of taxable property is not such a peculiarity as to take the case out of the rule; and that the only remedies against an abuse of administration power tending to taxation is furnished by the elective franchise or a proceeding on behalf of the State, or, in the case of an act without jurisdiction, in treating the attempt to enforce the illegal tax, as an act of trespass. DENIO, J., in *Roosevelt v. Draper*, 23 N. Y. 318; see also *Doolittle v. Supervisors, etc.*, 18 id. 155. The case of *Roosevelt v. Draper, supra*, decided in 1861, is the latest decision on the subject in the Court of Appeals, to which our attention has been called. We have been referred, however, to a number of earlier decisions in the courts of that State which hold a contrary doctrine — recognising the right to maintain such suits; and they have been followed in several of the other States.



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The first of these that will be noticed is the case of *Christopher v. The Mayor*, 13 Barb. 567, which was a proceeding by injunction to restrain defendants from acting under a resolution of the board of aldermen relative to the rebuilding of a market. Held, that plaintiffs as tax payers had such an interest as entitled them to the relief they asked; that as the necessary effect of the act complained of would be to impose a burden upon their real estate they had an interest as certain and direct as that of a stockholder in a moneyed or other corporation. So in the case of *Milbau v. Sharp*, 15 Barb. 195, which was an application for an injunction to restrain defendants from constructing a railway in a certain street of the city of New York, the court say, plaintiffs, being tax payers to a large amount, have such an interest in preventing the grant in question from being carried into effect, that they had a right to institute the suit in their own names. To the same effect is *Stuyvesant v. Pearsall*, 15 Barb. 244, in which it is held that the court on the complaint of a tax payer may restrain parties from constructing railroads in the city—the granting of the right to construct which involved a breach of trust on the part of the corporation. In *De Baun v. The Mayor*, 16 Barb. 392, it was held that a person owning real estate in the city of New York, and paying taxes on it, might prosecute an action against the corporation on behalf of himself and other tax-paying citizens to enjoin them from expending the money to be raised by taxation in repairing or paving a street in a manner contrary to an express law and tending to add to the taxes of the inhabitants. The same question came before the court again in the case of *Wood v. Draper*, 24 Barb. 187, decided in 1857, and after a thorough review of the previous decisions in that court on the subject, the court say: It must be regarded as the settled law of this court that it will grant its aid to restrain by injunction the imposition of any tax or burden on the tax payers of this city contrary to law, on a complaint filed by any tax payer on his own behalf as well as on behalf of others similarly interested." The correctness of these decisions has been questioned in some later decisions in that State which have been referred to. In *Sharpless v. The Mayor of Philadelphia*, 21 Penn. St. 147, the plaintiffs, as property owners and tax payers of the city, filed their bill to enjoin the Mayor from carrying into effect certain ordinances of the city which authorized subscriptions by the city to certain railroads. The right of the complainants to maintain

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the suit was unquestioned. In *Mercer county v. Pittsburgh & Erie Railroad Co.*, 27 Penn. St. 404, it is said, that as every taxable inhabitant is interested in all measures which increase the taxes he may apply for an injunction against abuses of that character. In a more recent case in that State, decided in 1868 (*Page v. Allen*, 58 Penn. St. 338), a bill in equity was filed by plaintiffs, residents and tax payers of Philadelphia, against the aldermen of the city to restrain them from exercising certain powers which, it was alleged, they claimed by virtue of a certain act of assembly known as the registry act, and charging that a large sum of money would be required from the city treasury to put the act into operation, which, as tax payers, they were interested to prevent, and which would be wholly misapplied. The act being unconstitutional, the court say, the right of the plaintiffs to interfere on these grounds was not disputed, neither could it have been at any time since the decision in *Sharpless v. The Mayor*, 21 Penn. St. 147, and *Moers v. City of Reading*, id. 188. In both it was conceded that the interest of a tax payer, where money was to be raised by taxation or expended from the treasury, was sufficient to entitle him to proceed in equity to test the validity of the law which proposed the assessment or expenditure. To the same effect is *Mott v. The Pennsylvania R. R. Co.*, 30 Penn. St. 9.

The next case to which we refer was decided by the Court of Appeals of Maryland in 1869. *The Mayor and Council of Baltimore v. Gill*, 31 Md. 375, 394-5. This was a proceeding to restrain by injunction appellants, The Mayor *et al.*, from carrying out the provisions of an ordinance authorizing the borrowing of money to build certain railroads, which was claimed to be unconstitutional. The complainants were tax payers on real and personal property situated in Baltimore, and they sued in behalf of themselves and others similarly interested. It was maintained that the complainants had no standing in court, and were not entitled to ask the interposition of a court of equity to restrain by injunction the execution of the ordinance, even though it may have been passed in violation of the constitution. It was further maintained that the wrong complained of was of a public nature, affecting the whole public in which the Attorney-General, as the representative of the State, was a necessary party. It was held that the interest of the plaintiffs, as tax payers, was sufficient to entitle them to maintain the action, and that the Attorney-

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General was not a necessary party. BARTOL, C. J., in delivering the opinion of the court, says: "The case is to be distinguished from cases of public wrongs, in which the general public are alike concerned; that the complainants are tax payers of the city, and others similarly situated constitute a class specially damaged by the alleged unlawful act, in the increase of the burden of taxation upon their property situated in the city. They have, therefore, a special interest in the subject-matter of the suit, distinct from that of the general public." The court cites the cases of *City of New London v. Brainard*, 22 Conn. 552; *Webster v. Town of Harwinton*, 32 id. 131; and *Merrill v. Plainfield*, 45 N. H. 126, as distinctly affirming the right of tax payers to file a petition of this kind, but we have not access to the reports at present. To the same effect are the decisions in Iowa, see *McMillan v. Lee County*, 3 Iowa, 311; *Collins v. Ripley, County Judge*, 8 id. 129.

The question was before the Supreme Court of Illinois, in the case of the *Board of Supervisors, etc., v. Keady*, 34 Ill. 293, but its consideration was waived by the plaintiffs in error, and the court expressed no opinion upon it, remarking that the question was undetermined in that State.

I have examined the cases cited in support of the other side of the question, or such of them as we have had access to; and upon a careful consideration of the subject, I am of opinion that the decisions which affirm the right of plaintiffs (or those standing in the same relation to such controversies) to maintain the action rests upon a more solid foundation of principle and reason than those holding the contrary doctrine. And they are commended to our approval as furnishing the only adequate remedy to the injured party for wrongs resulting from unauthorized or illegal acts like those complained of. The injury charged as the result of the acts complained of is a private injury in which the tax payers of the county of Macon are the individual sufferers, rather than the public. The people out of the county bear no part of the burden; nor do the people within the county, except the tax payers, bear any part of it. It is therefore an injury peculiar to one class of persons, namely, the tax payers of the county of Macon.

I am of opinion that the action is well brought in the name of the plaintiffs as tax payers, on behalf of themselves and all others

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who are similarly interested, and that the State is not a necessary party to the suit.

The judgment of the Circuit Court is reversed and the cause remanded. The other judges concur.

*NOTE.* — For an elaborate discussion of this question, see 2 Dill. Mun. Corp., § 731, *et seq.* After a careful analysis and examination of the decisions, Judge DILLON says (§ 736 a): "Upon a survey of decisions in Great Britain and the United States, while they discover some diversity of opinion it seems to us in view of the nature of municipal powers, the danger of abuse, the necessity for prompt remedy on the part of those most interested in the proper administration of municipal affairs, to wit, the taxable inhabitants, that the following conclusions rest upon reason and have, perhaps, also the support of the preponderance of judicial authority.

"1. The proper parties may resort to equity, and equity will entertain jurisdiction of their suit against municipal corporations and their officers when these are acting *ultra vires* or assuming or exercising a power over the property of the citizen or over corporate property or funds which the law does not confer upon them, and where such illegal acts affect injuriously the property owner or the taxable inhabitant. But if in these cases the property owners or the taxable inhabitants can have full and adequate remedy at law, equity will not interfere but leave them to their legal remedy.

"2. That in the absence of special controlling legislative provision, the proper public officer of the commonwealth which created the corporation and prescribed and limited its powers, may, in his own name, or in the name of the State on behalf of residents and voters of the municipality, exercise the authority in proper cases of filing an information or bill in equity to prevent the misuse of corporate powers or to set aside or correct illegal corporate acts.

"3. That the existence of such a power in the State or its proper public law officer is not inconsistent with the right of any taxable inhabitant to bring a bill to prevent the corporate authorities from transcending their lawful powers where the effect will be to impose upon him an unlawful tax or to increase his burden of taxation. Much more clearly may this be done when the right of the public officer of the State to interfere is not admitted or does not exist, and in such case it would seem that a bill might properly be brought in the name of one or more of the taxable inhabitants for themselves and all others similarly situated, and that the court should then regard it in the nature of a public proceeding to test the validity of the corporate acts sought to be impeached and deal with and control it accordingly."

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### HAYWARD, appellant, v. NATIONAL INSURANCE COMPANY.

(22 Mo. 151.)

#### *Fire insurance — waiver of conditions in policy by acts of agent.*

A policy of fire insurance was conditioned to be void if there should be any other insurance on the property without the assent of the company indorsed on the policy. *Held*, that this condition might be waived by the acts of the company's agent.

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**ACTION** on a policy of insurance by John T. K. Hayward, assignee of John A. Lennon, against the National Insurance Company of Hannibal. The opinion states the case.

*A. B. Wilson, Hatch & Hatch*, for appellant, cited *Horwitz v. Equitable Mut. Ins. Co.*, 40 Mo. 557; *Franklin v. Atlantic Fire Ins. Co.*, 42 id. 460; *Combs v. Hannibal Savings and Ins. Co.*, 43 id. 151; *Viele v. Germania Ins. Co.*, 26 Iowa, 54, 55; *Walsh v. The Etna Life Ins. Co.*, 30 id. 142, 145; *Von Borries v. United Life, Fire and Marine Ins. Co.*, 8 Bush, 133.

The instructions are contradictory and the judgment should be reversed. *Schneer v. Lemp*, 17 Mo. 142; *Crole v. Thomas*, 17 id. 329; *Wood v. St. Bt. Fleetwood*, 19 id. 529.

*Geo. H. Shields and Thos. H. Bacon*, for respondent. There is no evidence to support the instruction as to notice to Eby as agent, and corporations are not charged with knowledge by their agents, unless it was obtained in the course of their official and usual duties as such agents. *Mechanics' Bank v. Schaumburg*, 38 Mo. 228; *Gen. Ins. Co. v. United States Ins. Co.*, 10 Md. 517, 527; Story on Agency, § 140, *b*; Ang. Corp., § 30 *b*; *Farrel Foundry v. Dart*, 26 Conn. 376, 382; *Weisser v. Dennison*, 10 N. Y. 68, 77; *McCormick v. Wheeler*, 36 Ill. 114, 121; *Keenan v. Dubuque Mut. Ins. Co.*, 13 Iowa, 375, 382; *Forbes v. Agawam Mut. Ins. Co.*, 9 Cush. 470, 473; *Ayres v. Hartford Fire Ins. Co.*, 17 Iowa, 176, 187; *Bank U. S. v. Davis*, 2 Hill, 451, 461; *Franc v. Woods*, Tamlyn, 172, 176; Paley on Agency (3d Am. ed., 1847), 261; 1 Pars. on Cont. (5th ed.) 74; *Blumenthal v. Brainard*, 38 Vt. 402, 409; *Mellen v. Hamilton Fire Ins. Co.*, 17 N. Y. 609; *Schenk v. Mercer Co. Mut. Ins. Co.*, 4 Zab. 447, 454; *Sykes v. Perry Co. Mut. Ins. Co.*, 34 Penn. St. 79.

What constitutes notice? *Worcester v. Hartford Ins. Co.*, 11 Cush. 265; *Hale v. Mechanics' Ins. Co.*, 6 Gray, 169; *Fulton Bank v. New York and Sharon Co.*, 4 Paige, 127; *Washington Bank v. Lewis*, 22 Pick. 24, 31; *Bank of Pittsburgh v. Whitehead*, 10 Watts, 397, 402; *Tibbets v. Hamilton Ins. Co.*, 3 Allen, 569; *Sykes v. Perry County Ins. Co.*, 34 Penn. St. 79; *Obermeyer v. Globe Mut. Ins. Co.*, 43 Mo. 576, 579; *Northup v. Mississippi Valley Ins. Co.*, 74 id. 440.

The principal is bound by notice obtained by his agent in the

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discharge of his duties within the scope of his agency, but not by mere knowledge by the agent, no matter how obtained. *Viele v. Germania Ins. Co.*, 26 Iowa, 9; *Walsh v. Aetna Life Ins. Co.*, 30 id. 142; *Ex parte Carbis in re Croggon*, 4 Deacon and Chitty, 354; *Perry on Trusts* (1st ed.), 195, § 222; *Hill on Trusts* (2d Am. ed.), 232, side 165; 1st Pars. on Cont. 75; Ang. on Corp. (last ed.) 312-316; *Adams' Equity*, 322, side p. 157; 1 *Story's Eq. In.* (10th ed.) 398, § 408; *Story on Agency* (7th ed.), 161, § 140 c.

VORIES, J. This action was brought on a policy of insurance, charged to have been executed by the defendant to John A. Lennon, plaintiff's assignee, on the 23d day of July, 1868, and by which the defendant, "in consideration of the sum of twenty-one dollars paid by the said Lennon to defendant, did undertake to and did insure the said John A. Lennon for the period of six months from the date of said policy against loss or damage by fire to the amount of three thousand dollars, on his stock of merchant tailor's goods, consisting," etc.

The pleadings are very lengthy and prolix, but for the purposes of a decision upon the points presented to this court for adjudication, it will only be necessary to state the following issues made by the parties and which were passed on by the court below.

The defendant in its answer, amongst other things pleaded therein, set up the following special defenses: "For a severth defense herein, defendant says that amongst other conditions in said policy sued on, it was an express condition in said policy as to the property on which said policy was issued, that if said Lennon should have or should thereafter make any other insurance on the property thereby insured or any part thereof without the consent of the company indorsed thereon, then and in every such case the said Lennon should not be entitled to recover from the company any loss or damage which might accrue in or to the property thereby insured, or any part or portion thereof, and defendant says that said Lennon did not keep said express condition, but broke the same in this: That at the time when said Lennon made his request for insurance on which said policy was issued, and at the time said policy was executed and delivered by defendant, the said Lennon had other insurance on said property than the insurance alleged in plaintiff's petition. That is to say, insurance in the Insurance Company of for the sum of thres

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thousand dollars, without defendant's consent to said other insurance indorsed upon said policy sued on, nor did defendant ever consent to said or any other insurance. And defendant says that thereby said Lennon became not entitled to recover from defendant any loss or damage which accrued in or to said property, or any part or portion thereof."

The eighth defense set up by defendant is the same as the one above set forth, except that the breach of the condition is charged to be, that said Lennon, after the execution of the policy sued on, and its delivery to said Lennon, made other insurance on said property, in the sum of three thousand dollars, in the "Phoenix Insurance Company of Hartford, Connecticut," without the consent, etc.

The plaintiff in his replication to these defenses admits the condition in the policy as stated, and that said Lennon had at the time of the execution of the policy other insurance on the property insured in the sum of three thousand dollars as stated in the answer, but to avoid the effect of the supposed breach as stated by the defendant, the plaintiff avers, "that before and at the time of the issuing of said policy defendant well knew and was fully advised of the fact of such other insurance upon said property, and plaintiff avers that defendant, at the time it issued its said policy and received the premium therefor from said Lennon, waived the condition in said policy requiring notice of other insurance to be given to it, and furthermore waived the condition of said policy requiring consent of such other insurance to be indorsed on said policy in writing, and plaintiff further avers that defendant at the time aforesaid consented to said other additional insurance."

To the eighth defense set up in the defendant's answer as above stated, the plaintiff replied: "That he admits that after the time of the issuing of the policy sued on, to wit, on the                    day of                   , and at the time of the expiration of the said previous additional insurance above referred to, the said John A. Lennon, with the knowledge and consent of the defendant at the time, procured in place of said previous additional insurance the same amount of insurance, to wit, in the Phoenix Insurance Company of Hartford in the State of Connecticut, and last-named insurance was in force at the time of the burning of the goods named in plaintiff's amended petition, of which facts defendant had full knowledge and was fully advised of the renewal thereof in another

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company, and consented thereto, and plaintiff avers that defendant at said time waived the condition in said policy sued on, set out in defendant's eighth ground of defense, requiring notice of additional insurance to be given to defendant, and then and there waived the requirements of said condition requiring defendant's consent to such additional insurance to be indorsed on said policy in writing."

There were many other issues in addition to the above in the pleadings, but they are not brought in question in this court, so that it will only be required that I should state the substance of the evidence applicable to the foregoing issues, and the rulings of the court thereon, to give a fair understanding of the matters complained of by the appellant, and upon which he relies for a reversal of the judgment in this cause.

It appears from the evidence in the cause, that at and before the execution of the policy sued on to John A. Lennon, said Lennon was doing business in the city of Hannibal, as a merchant tailor, that his stock of goods amounted to from seven to eight thousand dollars, that one David S. Eby also resided in Hannibal and followed the business of an insurance agent, that he was agent for several insurance companies in the Eastern States as well as being agent at Hannibal for defendant.

That said Lennon had taken two policies of insurance from said Eby for three thousand dollars each, one in each of two Eastern companies for which Eby was agent, and that he had transacted the business with and procured the policies from said Eby.

That in the month of July, 1868, shortly before the making of the policy sued on, Eby told said Lennon that one of his policies of three thousand dollars was about to expire, and that he could not renew it at the same rates that he had been charged before. Eby testified that he was the vice-president of the defendant, and agent for several insurance companies, had his office in the same room with the president and secretary of defendant, that he was in the habit of taking risks for the defendant most generally in consultation with the other officers of the company; when the risks were out of the ordinary run of business, there was a general consultation; that he thought he was authorized by virtue of his position as agent to take risks generally. Haynes, the president, and Meadows the secretary of defendant were both apprised of the issue of the policy to Lennon upon which the suit is brought,



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before it was issued. Eby further stated that he was carrying six thousand dollars on Lennon's stock. A short time previous to the expiration of one policy he had a conversation with Meadows and Haynes, and told them that there was an opportunity of taking three thousand dollars on Lennon's stock, as he could not renew it in the company that it was in; after consultation with the company they agreed to take the risk. The company knew that he was carrying six thousand dollars insurance for Lennon at the time, did not know whether he received the premium from Lennon or whether the company received it. When Lennon was informed that one of his policies was about to expire, and that it could not be renewed at the same rate as before, he told Eby that he wanted it renewed, and requested him to continue it, said he had too much stock on hand to suffer any of his insurance to drop, he said he had about \$8,000 in stock or over, that he wanted the policy continued.

• The evidence further shows that after Eby had the consultation with the other officers of defendant, that he made out the policy upon which this suit was brought, and when the old policy had expired he handed it to Lennon who objected to it, said he did not want to be put in the National, but that Eby assured him that it was a good company, and he then received it, telling him that he took it on his word, that he never examined the policy until after the fire which destroyed his goods.

The evidence further tends to show that Eby continued to be agent and vice-president of the defendant until after the month of September, 1868. In September, 1868, Eby was as agent of an eastern company still carrying the three thousand dollar policy on Lennon's goods in addition to the policy in suit, and that at said time said policy was about to expire, Eby told Lennon that the policy was about to expire and that he could not renew it at the same rates paid before. Lennon said he wanted the policy renewed. Eby told him to wait a few days and he might still be able to renew it; that afterward, on the day the policy expired, Eby told Lennon that he was then prepared to renew the policy. Lennon told him he was too late; that he had just insured in another company, and thus renewed the amount of the three thousand dollar policy. Eby told him that that was all right. Eby states that he thinks he was still vice-president and acting as agent of defendant at the time of this last conversation.

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The foregoing is substantially the evidence in the cause in reference to the knowledge and consent of defendant as to the three thousand dollar insurance on the property in addition to the policy sued on, either at the time of the execution of the policy by the defendant, or at the time that said insurance was changed to the Phoenix Company in September afterward.

The question presented for the consideration of this court is, whether the evidence in this case or the circumstances under which the policy was sued on was executed and delivered to Lennon, were such as to amount to a waiver of the condition in the policy, that the policy should be void or no recovery had thereon, if the insured should have other insurance on the same property which was not much known and not indorsed on the policy? And whether the condition was waived that required notice to be given and indorsement made thereof on the policy of any additional insurance being afterward made on said property? Or whether the defendant was estopped from setting up the breach of said conditions as a defense to the action?

In my mind there can be very little doubt as to the three thousand dollar policy which existed on the property at the time the policy was executed by the defendant. Eby, the agent and vice-president of the defendant, had executed and delivered to Lennon two policies, as agent for eastern companies, one of which was about to expire. Lennon wanted it renewed, but Eby could not renew it on terms to suit. This being the case, he had a consultation with the president and secretary of defendant, in which he informed them of the whole matter, and that there was a chance for the defendant to take a risk for three thousand on Lennon's goods in place of the policy about to expire. After a full consultation they concluded to take the risk, and the policy was made out before Lennon was seen on the subject, and the same afterward handed to him. He hesitated to receive it until he was assured that the company was a good, responsible one, when he accepted the policy without ever looking at its contents, as the evidence shows. It was evidently known by all parties that the remaining three thousand dollar policy was to continue on the property insured, because Lennon had informed him that he could not afford to let any of his insurance be *dropped*. Lennon had a right to expect, under these circumstances, that defendant had indorsed on the policy its consent to this remaining policy of three thousand dollars, which good faith required it under

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the circumstances to have done. So far as this prior insurance is concerned, the case comes exactly within the principle laid down in the case of *Horwitz v. The Equitable Mut. Ins. Co.*, 40 Mo. 557. The defendant considered the whole matter in reference to the insurance already on the property and took the risk in reference thereto, and they should be estopped from setting up the breach of said condition as a defense to the action, said breach having been waived. In reference to the renewal of the insurance at a time subsequent to the execution of the policy sued on by the defendant, or the changing the same to another company, the evidence is not so clear of an intention to waive the condition requiring the defendant's knowledge and consent thereof to be indorsed on the policy. It is contended by the defendant that it was not notified of said subsequent insurance, and that it never in any way assented thereto, while, on the other hand, it is contended by the plaintiff that the evidence shows that defendant had full notice of the subsequent insurance and assented thereto, and so acted as to induce the said Lennon to rest in security in the belief that his property was fully insured. The main question in the case is, whether notice of this subsequent insurance to the agent who effected the risk for defendant will be considered as a notice to the defendant. For I think that the evidence clearly show that Eby was still vice-president and agent for the defendant at the time that this last insurance was effected. At least, if there were any doubts as to his agency at the time, that fact ought to have been submitted to the jury by a proper instruction.

The authorities upon this last question are somewhat in conflict and cannot well be reconciled with each other. The cases referred to by the defendant in the Massachusetts courts, and other cases referred to, seem to accord with the views entertained by the defendant.

In the case of *The General Insurance Company v. United States Insurance Company*, 10 Maryland, 517, the question was as to notice by the corporation of an unrecorded deed of mortgage, so as to affect a subsequent mortgage. It is there held, that the notice in such case must be sufficient to put a party on inquiry, and that, conceding that a director of the corporation to be affected had notice of the prior mortgage, it does not appear that he had communicated the notice to the board of directors, and was therefore not sufficient; that the notice received by a director of a corporation in a private

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way, or which he acquired from rumor, would not bind the institution ; that the case must be so clear as to satisfy the mind that the allowance of the subsequent claim would be a fraud on the party setting up the first deed ; and to the same effect is the case of *Farrell Foundry v. Dart*, 26 Conn. 376. The case of the *Worcester Bank v. Hartford Insurance Company*, 11 Cush. 265, was a case where the policy sued on contained a clause almost precisely similar to the clause in the policy of defendant under consideration. It was held that in such case, where a subsequent insurance had been obtained and the agent of the company notified thereof, and he had promised the assured to have the consent of the subsequent insurance entered in the policy but failed to have it done, that still the policy is avoided, the technicalities of the contract not having been complied with, and to the same effect are several other cases in Massachusetts.

It is contended by the defendant in this case that no notice to an agent of the company could operate as notice to the defendant, unless the agent received the notice at a time in which said agent was engaged in the execution or performance of the business to which the notice related, or unless it is shown that the agent communicated the notice to his principal. To sustain this view of the case reference is made to several cases.

In the case of *McCormick v. Wheeler*, 36 Ill. 114 (reference by defendant), it is held that notice to an attorney of one party which he had received while acting as the attorney of another party is not such notice as will affect his client. It is remarked by the judge delivering the opinion in the case "that the English authorities manifest a disposition to depart from this rule, but it is deemed by the court to be a rule just in itself."

In the case of the *Mechanics' Bank v. Schaumburg*, 38 Mo. 228, Judge HOLMES delivering the opinion of the court, says, that "knowledge acquired by the president, cashier and teller, while engaged in business of the bank in their official capacity, will be notice to the bank ; so far as either has authority to act for the bank, his acts are the acts of the bank, and his official knowledge is the knowledge of the bank ; but mere private information obtained beyond the range of his official functions will not be deemed notice to the bank."

It is difficult to exactly understand what is meant by the language used in these decisions. The defendant contends that it is

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meant by the decisions referred to as well as other decisions using similar language, that no notice served on an agent will be effectual to bind his principal, unless the agent should receive the notice while actually engaged in the transaction of the very business to which the notice relates, or unless it is shown that it was communicated to the principal. If that should be the proper construction to be given to the language, then it would become impossible that an agent of an insurance company could ever be notified of a subsequent policy of insurance being issued upon the same property before insured by said agent for his principal. Every agent as soon as he takes a risk and issues a policy therefor and delivers it to be insured, dismisses the subject of that policy from his mind. If the insured should afterward procure a subsequent insurance on the same property and go to the agent to give him notice thereof, he would be sure to find the agent in the transaction of some other business, when, according to the construction given to these cases, no notice could be given to the agent because he was not at the time engaged in the particular business to which the notice related, and this, notwithstanding the agent was the only agent of the corporation whose business it was to attend to the very matter to which the notice related.

I think that this is not the proper construction to give to these cases; the meaning must be that the notice must be given to the agent while his agency exists, and it must refer to business which comes within the scope of his authority; when this is the case I think that notice to the agent is notice to the principal, in fact there is no other way to notify a corporation than to notify an agent. A corporation only acts through and by agents, and the proper and only way to give notice to a corporation is to notify an agent, and generally it is sufficient to notify an agent whose proper business is to attend to the matter in reference to which the notice is given.

In the opinion of Judge HOLMES in the case of the *Bank v. Schaumburg*, above referred to, Story's Agency, § 140, is referred to, from which it may be seen what was meant by the language used in that decision. The section referred to reads as follows: "Upon a similar ground notice of facts to an agent is constructive notice thereof to the principal himself, where it arises from or is at the time connected with the subject-matter of his agency; for upon general principles of public policy, it is presumed that the agent has communicated such facts to the principal, and if he has

not, still the principal, having intrusted the agent with the particular business, the other party has a right to deem his acts and knowledge obligatory on the principal, otherwise the neglect of the agent, whether designed or undesigned, might operate most injuriously to the rights and interests to such party, but unless notice of the facts come to the agent while he is concerned for the principal, and in the course of the very transaction, or so near before it that the agent must be presumed to recollect it, it is not notice thereof to the principal; for otherwise the agent might have forgotten it, and then the principal would be affected by his want of memory at the time of undertaking the agency. Notice therefore to the agent before the agency is begun, or after it has terminated, will not ordinarily affect the principal."

This quotation from STORY seems to me to solve the whole question, which is, that *notice to the agent before his agency has begun, or after it has terminated, will not ordinarily affect the principal*. If notice is given before the agency has begun, to affect the principal it must be so near before it that the agent must be presumed to recollect it.

This rule, as laid down by Judge STORY, I think, is the correct one, and must be the proper interpretation to be given to the language used in the cases on the subject.

Now, to return to the facts of the case under consideration we find that Lennon in the month of July, 1868, had procured from one Eby two policies of insurance for \$3,000 each, one in each of two eastern companies for which said Eby was agent. That said Eby was also agent for defendant, having authority to take risks and issue policies for it. That one of the Eastern policies was at said time about to expire. That Eby informed Lennon that he could not renew the policy on the same terms that the policy had been issued before. Lennon insisted that he wanted the policy renewed, that he could not afford to drop any part of his insurance, that he was not then fully insured, that his stock of goods was heavy, etc. Under these circumstances, Eby communicated the facts in reference to this matter to the president and secretary of defendant, telling them that one of Lennon's policies was about to expire and that there was a chance for defendant to take the risk for three thousand dollars in place of the policy about to expire. After full consultation it was concluded to take the risk for three thousand dollars, and a policy was executed to Lennon

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therefor, without any application on his part therefor, and in fact without his knowledge, and that when it was delivered to him, he first objected to receive it, but upon being assured by Eby that the company was a good one he received the policy. At this time it was well known to Eby and defendant, that Lennon intended to continue the one Eastern policy upon his goods, and that he did not intend in any way to lessen or diminish his insurance. This being the case, sometime in the month of September or October of the same year, when the second or last Eastern policy was about to expire, Lennon was informed by Eby (who the evidence shows was still agent of defendant) of the fact, and that he could not renew it on the same terms that it had been originally issued. Lennon expressed a desire to have the policy renewed and wanted to keep up his insurance. Eby at this time told him to wait a few days, that he might yet be enabled to renew the policy. Lennon did wait until the day that the policy expired, and then insured in another company in the same amount, and upon meeting with Eby, he informed him of what he had done, and was told by Eby that it was all right.

Now under the circumstances had Eby, the agent, notice at the time of the change of the policy procured from him in the Eastern company for the policy to the same amount in the Phoenix Company, and did he assent thereto? And did such assent amount to a waiver on the part of the defendant of the condition in the policy, avoiding the same where additional insurance is taken without the consent of defendant indorsed on the policy, as has been before stated? That Eby knew of the new policy, there can be no doubt; in fact it was known by Eby and the officers of defendant at the time of the issuing of the policy sued on, that Lennon intended to continue the whole six thousand dollars of insurance on his stock of goods. The policy of defendant was made with that view, and what was afterward done was only carrying out the understanding had between the parties at the time; hence when the policy was about to expire, Eby told Lennon that the policy was about to expire, and that he could not then renew it on the same terms, but to *wait* a few days that he might still become able to renew it. Why was it that Eby asked him to wait? It was to my mind, because it was known and expected that if Eby did not renew the policy, the insurance would be taken in another company, and this was only a continuation of the original

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understanding and was expected by Eby, and when he was told that it had been done, he answered that it was all right. Eby was at the time still the agent of the company and notice to him was notice to the defendant.

In a late case in the State of Illinois (*Illinois Mutual Fire Ins. Co. v. Malloy*, 50 Ill. 419), the policy in question contained a clause to this effect: "If the assured shall thereafter make any other insurance on the same property, and should not with all reasonable diligence give notice thereof to the insurer, and have the same indorsed on the policy, or otherwise acknowledged by them in writing, the policy shall cease and be of no further effect." The insured in that case did effect an additional insurance on the same property. It was held that it was not sufficient in such case to give notice to a stranger who had long since ceased to be an agent of the company. The court, however, in rendering the opinion says, "Had the party notified been the agent of the company, his failure to indorse consent on the policy would not have prejudiced the assured; as we said in the case of *N. E. Fire and Marine Ins. Co. v. Schettler*, 38 Ill. 166." It was, however, further held, in that case, that it was the duty of the assured to know that the party notified was agent. This case seems to sustain the view that a notice to one who is known to be an agent is sufficient to charge the company, and that, where notice is given of an after insurance and no objection made at the time, the policy will not be thereby forfeited.

I do not say that the fact that Lennon told Eby after he had taken the last policy that he had given the risk to another company would have been sufficient of itself to constitute a waiver of the condition in the policy in question; but this fact, taken in connection with all of the other facts connected with the transaction, I think is sufficient; and that to permit the defendant to insist on a forfeiture of the policy, under all of the circumstances, would be to enable it to perpetrate a fraud on Lennon.

In the investigation of the case, it has not been overlooked that this court, in the case of *Hutchinson v. The West. Ins. Co.*, 31 Mo. 97, held that a condition in a policy similar to the one under consideration was a condition precedent to the right of the insured to recover on the policy, and that nothing would prevent a forfeiture of the policy but the actual indorsement of the consent of the insurer to the subsequent insurance. Subsequent cases, however, in this



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court, as well as in other courts, which seem to have been well considered, have recognized a more liberal rule in favor of the insured. In these late cases, it has been held that the condition in the policy under consideration, as well as other conditions of similar nature, may be waived by the company, and that the waiver may be made as well by "acts as by positive declarations, and that the company may be estopped under certain circumstances, where, by a course of dealing or its open actions, it has induced the assured to pursue a policy to his detriment." *Horwitz v. The Equitable Mut. Ins. Co.*, 40 Mo. 557; *Franklin v. The Atlantic Fire Ins. Co.*, 42 id. 456; *Coombs v. Hannibal Savings and Ins. Co.*, 43 id. 148; *Northrup v. The Miss. Val. Ins. Co.*, 47 Mo. 435; *Viele v. Germania Ins. Co.*, 26 Ia. 54, 55; *Walsh v. The Aetna Life Ins. Co.*, 30 id. 133; 6 Am. Rep. 664; *Von Borries v. The United Life, Fire and Marine Ins. Co.*, 8 Bush (Ky.), 133.

The Common Pleas Court, on the trial of this cause, instructed the jury "that it devolved on the plaintiff to show that consent was given by the company to such other insurance and indorsed on the policy sued on, and unless the jury find from the evidence that such consent was indorsed on said policy sued on, they will find for the defendant." This instruction assumes that no waiver of the condition in the policy could be made by the company; but the jury are told that, unless the indorsement of consent was actually made on the policy, they must find for the defendant. This instruction was clearly wrong, and ignored the whole issues in the case to which it referred as made up by the pleadings. It is, however, said that this instruction was modified by another instruction given by the court. This, upon examination, will be found to be incorrect. There is no instruction given by the court that could be construed to be a modification of the one above referred to. There is another instruction which tells the jury that if the policy securing the additional insurance had expired before the loss, that then, although the consent of the company to the same was not indorsed on the policy, the plaintiff might recover. This instruction only applied and could only apply to the insurance existing on the property at the time of the issuing of the policy sued on, as there was no pretense that the subsequently procured policy had expired. And the first instruction referred to was complete in itself, and so far as the instruction given by the court, to which reference is made, dif-

disregarded. But the same question was subsequently taken to the Exchequer Chamber on error in the case of *Dalby v. The India and London Life Assurance Co.*, 15 Com. Bench, 364, and *Godsall v. Boldero* was directly overruled.

There it was held, that the contract of life assurance was not one of indemnity, but a mere contract to pay a certain sum of money on the death of a person in consideration of the due payment of certain annual premiums during his life. An insurance on life has in fact very little resemblance to a fire or marine insurance. In a fire or marine insurance the particular object is to indemnify against a pecuniary loss, and the event upon which the money is made payable is the happening of the loss, the terms of the contract being to pay whatever is lost, not exceeding a specified amount. But a life insurance is a valid policy and a contract to pay a certain definite sum on the happening of a particular event, which may or may not occasion a pecuniary loss. In England there is a statute (4 Geo. III, ch. 48) which enacts in express terms, that no insurance shall be made on the life of any person, wherein the person for whose use such policy shall be made shall have no interest, and that in all cases where the insured hath interest in the life, no greater sum shall be recovered or received from the insurers than the amount or value of the interest of the insured during such life. But this statute does not extend to Ireland, and the courts of that country have held in a number of cases that, at the common law, policies of insurance are valid without any interest. *Bunyon on Life Ass.*, p. 11; *Shannon v. Nugent*, 1 Hayes, 536; *Ferguson v. Lomax*, 6 Dru. & War. 120; *Scott v. Roosa*, Long & Town. 54; *Brit. Ins. Co. v. Magee*, Cooke & Al. (Irish Rep.) 182.

In this State we have no statute on the subject covering this case, and as the policy is not void by the common law, it can only be declared so on the ground that it is against public policy. There is nothing to show that the contract was a mere wagering one, or that it is in any wise against or contrary to public policy. In *McKee v. The Phoenix Ins. Co.*, 28 Mo. 383, it was held that where the life of a husband was insured for the benefit of the wife, the policy was not necessarily determined by the wife's obtaining a divorce from the husband; that she might still have an insurable interest in the life of the divorced husband that would support the policy. In *Lord v. Dall*, 12 Mass. 118, the plaintiff was a young female without property, and had been for several years supported

and educated at the expense of her brother, who stood toward her in the attitude of a parent. He effected a life policy for her benefit, and it was decided that she had an insurable interest in his life. PARKER, C. J., who wrote the opinion of the court, said: "But it is said the interest must be a pecuniary legal interest to make the contract valid — one that can be noticed and protected by the law; such as the interest which a creditor has in the life of his debtor, a child in that of his parent, etc. The former case indeed of the creditor would leave no room for doubt. But with respect to a child, for whose benefit a policy may be effected on the life of a parent, the interest, except the insurable one which may result from the legal obligation of the parent to save the child from public charity, is as precarious as that of a sister in the life of an affectionate brother. For if the brother may withdraw all support, so may the father, except as above stated. And yet a policy effected by a child upon the life of a father, who depended on some fund terminable by his death to support the child, would never be questioned, although much more should be secured than the legal interest which the child had in the protection of his father. Indeed, we are all satisfied that the interest of plaintiff in the life of her brother is of a nature to entitle her to insure it. Nor can it be easily discerned why the underwriters should make this a question after a loss has taken place, when it does not appear that any doubts existed when the contract was made, although the same subject was then in their contemplation."

This case establishes the principle that an uncertain interest in the life of the person insured is sufficient to support and uphold a policy in favor of another for whose benefit it was taken. The brother supported and educated the sister, but he was under no legal obligations to do so, and he might have withdrawn that support at any time.

In a well-considered case (*The Trenton Mut. Life & Fire Ins. Co. v. Johnson*, 4 Zab. 576) the point has been directly decided, that it is not necessary for the plaintiff to prove an insurable interest in the life insured, and that, if any interest were necessary, it need not be such as to constitute any direct claim upon the insured, but it would be sufficient if any indirect advantage might result from the life.

There was no statute in New Jersey, when this decision was made, prohibiting such insurances, nor is there any here. The

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insurance was not a mere wagering contract, and therefore cannot be said to contravene any principle of public policy. The plaintiff had an interest in the life of Clark; a valid contract of marriage was subsisting between them. Had he lived and violated the contract she would have had her action for damages. Had he observed and kept the same, then as his wife she would have been entitled to support. In my opinion she had such an interest as was entirely sufficient to render the contract valid. The defense in this case is devoid of merit, and is not creditable to the defendant making it. There is no pretense that there was any concealment of facts at the time of making the contract. Upon the facts there was no hesitation in entering into the agreement and obtaining the premium and issuing the policy. Had the defendant been as willing to observe and fulfill its obligations as it was to receive premiums, then this case would have never occupied the time of the courts.

The judgment should be affirmed.

All the judges concurring.

*Judgment affirmed.*

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**BARTON v. ST. LOUIS & IRON MOUNTAIN R. R. Co., appellant.**

(22 Mo. 232.)

*Negligence — when a question for the jury.*

In an action against a railroad company by a passenger to recover for the negligent breaking of his arm, the evidence tended to show that at the time of the injury the plaintiff had his arm outside the car window. *Held*, that this was not *per se* negligence in the plaintiff, but that whether it contributed to the injury was a question for the jury. (*See note, p. 423.*)

**ACTION** to recover damages for an injury received by plaintiff through the alleged negligence of the defendant.

*Dryden & Dryden*, for appellant.

*Oline, Jamison & Day*, for respondent.

**EWING, J.** This is an action for damages for an injury received by the plaintiff while a passenger on one of defendant's cars. The

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evidence tended to prove that, when injured, the plaintiff was sitting in the rear car of the train, at or near an open window, and that the injury to his arm was caused by the car coming in contact with a wagon loaded, with a skiff among other things. As to the position of his arm at the time, whether inside or protuded out of the window, the evidence was somewhat conflicting.

There was a verdict and judgment for the plaintiff, and a motion for a new trial being overruled, the cause is brought to this court by appeal.

The court gave the following instructions to the jury at the instance of the plaintiff.

First. If the jury find that plaintiff was injured as charged in the petition, while being transported as a passenger in defendant's car from the city of St. Louis to the town of Carondelet, and that it was caused by the carelessness of defendant's agents and servants in running, conducting and managing said car, or the train to which it was attached, without any fault, misconduct or negligence on the part of plaintiff immediately contributing thereto, then they must find for the plaintiff.

Second. Although plaintiff may have failed to exercise ordinary care and prudence while a passenger on defendant's car, which may have contributed remotely to the injury complained of, yet, if the employees of defendant were guilty of negligence which was the direct and immediate cause of the injury, and might have prevented it by the exercise of prudence and care, the defendant is liable.

The court refused to give the following instructions asked by defendant.

First. That although the jury may find from the evidence that the plaintiff while riding as a passenger in defendant's car was injured, by having his arm broken, yet if they further believe, from the evidence, that at the time such injury happened the plaintiff's said arm was by the inadvertence of the plaintiff protruded through and out of the window of the said car, and that but for his said arm being thus out of said window the plaintiff could not and would not have received the injury complained of, the verdict should be for the defendant.

Second. The court instructs the jury that, although they may believe, from the evidence, that the plaintiff while riding as a passenger in defendant's car was injured by having his arm broken,

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yet if they further believe, from the evidence, that at the time such injury happened plaintiff's arm was by the inadvertence or carelessness of plaintiff protruded through and out of the window of said car, and that plaintiff was guilty of negligence in thus placing his said arm, contributing directly to the injury complained of, the verdict should be for the defendant.

The court gave the following instruction, namely:

That although the plaintiff was injured by having his arm broken, yet if, at the time of said injury, plaintiff by negligence or carelessness had his arm out of the window of said car, and that such negligence or carelessness contributed directly to the happening of such injury, the verdict should be for the defendant.

The principal question arises upon the first instruction asked by the defendant, whether the hypothetical facts of that instruction constituted negligence *in se* and barred a recovery. The instruction virtually assumes that it was immaterial in what manner or from what cause the collision which produced the injury occurred; that the protrusion of the arm of plaintiff out of the car-window was negligence, which must defeat the action, if in the language of the instruction the injury *could not* and *would not* have happened but for this act of the plaintiff.

It also assumes that there was no evidence of negligence on the part of the defendant or its employees; that the fact of an obstruction being on or near the track was not to be considered by the jury in passing upon the question of negligence; that the defendant had no duty to perform in keeping a lookout for obstructions of this nature; that although the engineer may have seen the wagon on or near the track before the collision occurred, it was not his duty to stop the train, or endeavor to do so, to avoid the danger. It also assumes as immaterial the fact that the collision happened at a place on the track, and under circumstances which were not calculated to excite any apprehension of danger in the mind of a man of ordinary prudence, who was a passenger, and situated as plaintiff was, or to call for extraordinary care on his part; and that no reasonable degree of vigilance could have foreseen or anticipated it. It also further assumes that the collision, sufficient to tear off the battings from the car, and also the hind steps of the car, could not have been the cause of the very act of the plaintiff, which is imputed to him as culpable negligence or inadvertence; that the force could not have been applied to the car in such a manner as to have irresistibly

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forced plaintiff's arm outside of the window; or that it could not have been an involuntary or mechanical movement, prompted by an instinctive shrinking from imminent danger, the nature of which he may have been equally disqualified at the time to comprehend or guard against.

All these circumstances were virtually excluded from the consideration of the jury by the instruction; and they all had a bearing directly or remotely on the question of negligence.

The negligence which will prevent a recovery in such cases is nothing more than the absence of proper care; such care as a person of ordinary prudence would exercise under similar circumstances; and this question is almost always more or less affected by the conduct of the defendant. A solution of it is rarely found in the conduct of the complaining party alone.

Inadvertence is not necessarily culpable. It may be so, or not, according to circumstances. The instruction assumes that it *was culpable* in the case before us. Negligence of such a character as to defeat the action is predicated of an act of inadvertence, which, as we have seen, may have been caused by the misconduct of the defendant, which conduct the jury, under the instruction, would not have been permitted to consider. The evidence, as already observed, was conflicting as to the position of plaintiff's arm at the time the collision occurred, and also as to facts which tended to show negligence on the part of the defendant. Upon the state of facts just closed, the defendant insists that the question of negligence should have been taken from the jury, and that the court should have declared, as a matter of law, that if the plaintiff's arm was protruded through the window by inadvertence, and the injury could not have resulted but for that act, there could be no recovery.

The proposition is that the negligence is a question for the court, not the jury. On this question there is an apparent conflict of authority, but it is only apparent, so far as I have seen, with few exceptions.

In the State of Connecticut it seems to have been held in one case that negligence is so peculiarly a question of fact that it should be left to the jury even on a conceded state of facts. 19 Conn. 566.

This, in my view, is erroneous. Whether it is a question for the court or the jury must be determined by the facts of the particular case. Negligence is in all cases in a certain sense a question of fact

for the jury ; that is, it is for the jury to determine whether the facts bearing upon the question exist or not. But when the facts are undisputed, or are so clearly proved as to admit of no doubt, it is the duty of the court to apply the law without submitting the question to the jury. This involves no invasion of the province of the jury, nor any infringement of their legitimate functions, no more than when the court passes upon a demurrer to the evidence, or on motions for new trials upon the ground of the want of any evidence to sustain the verdict of a jury.

In *Keller v. The N. Y. Cent. R. R. Co.*, 24 How. Pr. 172, this view is aptly expressed by the learned judge, who says : "When the facts are so clear and decided, that the inference of negligence is irresistible, it is the duty of the judge to decide ; but when the facts or the inference to be drawn from them are in any degree doubtful, the only proper rule is to submit the whole matter to the jury, under proper instructions."

The only difficulty is in making a practical application of it to the particular case. The cases cited by counsel from Indiana, North Carolina and Pennsylvania, as I view them, are not inconsistent with this rule. There is nothing in those cases, in my opinion, that warrants the deduction that negligence is always a question for the court, and not for the jury.

In the case of *Pittsburg C. R. R. Co. v. McClurg*, 56 Penn. St. 300, the evidence was not before the court, but it appeared from the record, that the plaintiff, McClurg, while a passenger on defendant's train of cars, suffered his elbow to project from the window of the car in which he was a passenger, and in passing a switch it came in contact with a car standing on the switch, and was broken. The court held upon the state of facts as matter of law, that plaintiff was guilty of a want of due care which would prevent him from maintaining the action. The court say, where a traveler puts his elbow or an arm out of a car-window voluntarily, *without any qualifying circumstances impelling him to it*, it must be regarded as negligence *in se*, and when that is the *state of the evidence*, it is the duty of the court to declare the act negligence in law !

In some of the decisions of this court, language is employed to the effect, that the question of negligence is peculiarly and exclusively for the jury ; but such language must be interrupted in view of the facts of the case, as they affect that question — not as legal



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propositions of universal application. There is an exception, however, in the case of *Huelsenkamp v. The Citizens' Railway Co.*, 34 Mo. 54. The learned judge says, in delivering the opinion of a majority of the court: "A court cannot direct a jury that such or such supposed facts show negligence, or that such other supposed facts do not show negligence." The proposition here asserted is, that upon no state of facts is it the right or province of the court to apply the law, or pronounce the legal effects of facts affecting that question, however clearly proved, or even if they were undisputed. Such a proposition as we have endeavored to show is untenable.

The case of *Devitt v. The Pacific R. R. Co.*, 50 Mo. 302, is not in conflict with the rule above stated. The facts in that case, affecting the question of negligence of the deceased — who was an employee at the time of the company — were undisputed; and the court held that it was a proper case, therefore, for instructing the jury, that certain enumerated facts, which unlike the case at bar were *all the facts*, if found to exist, constituted such contributory negligence as would prevent a recovery; and properly held the refusal to give such an instruction erroneous; there being no doubt as to the facts, nor as to the inference to be drawn from them, it was the duty of the court to declare their legal effect.

The instructions given by the court, taken together, present the law applicable to the case very fully and clearly.

The only remaining point is the refusal of the court to give an instruction in the nature of a demurrer to the evidence at the close of plaintiff's testimony. In this the court committed no error. The evidence adduced by the plaintiff showed that the injury to his arm was caused by a collision of the car with a wagon and skiff near the track, in the manner already described, and that the engineer could have seen this obstruction at the distance of some two hundred yards; that no warning was given by him to put on the brakes, and that the train might have been "broken up," or stopped by the time it reached the obstruction.

Upon this state of facts the court properly refused to give the instructions asked.

The other judges concur.

*Judgment affirmed.*

NOTE.—In *Chicago & Alton Railroad Co. v. Pondrom*, 3 Am. Rep. 306 (51 Ill. 333), the Supreme Court of Illinois, under the rule in that State as to comparative negligence, held a railroad liable for injury to a passenger's arm, although the arm was projected from a car window. So a company was held liable under like circumstances in *Spencer v. Milwaukee*,

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*etc.*, Railroad Co., 17 Wis. 437, the opinion in which case considers the question with great ability. To the contrary is *Holbrook v. Utica & Schenectady Railroad Co.*, 12 N. Y. 286; *Todd v. Old Colony Railroad Co.*, 3 Allen, 18, and 7 id. 207; *Pittsburgh, etc., Railroad Co. v. McClurg*, 56 Penn. 21, 284; *Indianapolis, etc., Railroad Co. v. Rutherford*, 20 Ind. 62; *Louisville Railroad Co. v. Lickings*, 5 Bush, 1; and *Pittsburgh, etc., Railroad Co. v. Andrews*, recently decided in the Court of Appeals of Maryland but not yet reported; *Telfer v. Northern Railroad Co.*, 30 N. J. Law Rep. 190; see Wharton on Neg., § 261; Shearm. & Redf. on Neg., § 261.

## BROTHERS v. CARTER, appellant.

(88 Mo. 372.)

*Master and servant — Liability of master to servant for negligence of co-servant — superintendent not co-servant.*

A superintendent who has entire control of any work, with power to employ and discharge workmen and to provide and remove material, is not a fellow-servant within the meaning of the rule that a master is not liable for injuries to a servant, caused by the negligence of a co-servant; and for the negligence of such superintendent, occasioning injury to an employee, the master is liable.

ACTION for damages for injuries received by the plaintiff while in the employ of the defendants. The opinion states the case.

*Lackland, Martin & Lackland and Dryden & Dryden*, for appellants.

*Stewart & Wisting*, for respondent.

WAGNER, J. This was an action for damages received by the plaintiff while in the employ of defendants in the construction of a bridge across the Aux Vasse river, in the county of Callaway, Missouri, for the Fulton and Jefferson Branch of the Louisiana and Missouri railroad. The material averment in the petition is, that while the plaintiff was at work on the bridge, one span fell, and plaintiff was precipitated a distance of seventy-three feet upon the rock and debris beneath, and was thereby seriously injured.

The cause of the falling of this span of the bridge is alleged to have been the insufficiency in amount and quality of the bracings and false work used in the construction of the span, that defendants failed to furnish proper and sufficient material for the erection of

said structure, and because of the removal by defendants of supports and bracings, which had been furnished for this purpose; and that defendants well knew of the insecure condition of the structure and of the deficiency and insufficiency of the materials furnished for the same and of the dangerous condition of the structure, and that in consequence of defendants' negligence and recklessness in and about the premises, plaintiff was injured, etc.

The plaintiff gave evidence strongly tending to prove his averments.

It appears that defendants did not personally have charge of the work, and what they knew of its character and condition was from being about it occasionally during its progress.

They did not attend personally to the purchase and collection of materials, or to directing the construction. The former duties were committed to the superintendent, Graham, and the latter to the foreman, Logan.

The jury rendered a verdict for the plaintiff, and as there was ample evidence to support it, of course this court will not interfere, unless they were misled by wrong instructions.

The instruction given for both parties, taken together, fairly presented the law, and the second instruction given for the plaintiff is the only one that is seriously complained of here. That instruction is as follows: "If the jury find from the evidence that one John Graham was the superintendent for defendants of the work on the bridge in question, and as such had entire control and charge thereof, with power to employ and discharge hands, and to provide and remove material, and that the said Graham was the representative of the defendants in the construction of said bridge, and that plaintiff was subject to his orders and directions, the jury are instructed that said Graham was not a fellow-servant with the plaintiff, and that his acts and conduct in connection with said bridge were and are the acts and conduct of defendants so far as this case is concerned."

The other instructions essentially lay down the law as it was declared by this court in the case of *Gibson v. Pacific Railroad Co.*, 46 Mo. 163, that where injuries to a servant were owing to improper or defective machinery or appliances used in the prosecution of the work — the condition of which, by reasonable and ordinary care and prudence, the master might know — and not to the lack of care

and prudence in the servant, the master would be liable. That the legal implication was, that the employer would adopt suitable instruments and means with which to carry on his business, and if he failed to do so he was guilty of a breach of duty under his contract, for the consequences of which, in justice and sound reason, he would be responsible.

In that case we also held, affirming the cases of *McDermott v. Pacific Railroad Co.*, 30 Mo. 115, and *Rohback v. Pacific Railroad Co.*, 43 id. 187, that where injuries to servants or workmen happen through the negligence, misfeasance or misconduct of a fellow-servant, no action therefor can be maintained against the master, unless the fellow-servant is not possessed of the ordinary skill and capacity in the business intrusted to him; and unless his employment is attributable to the want of ordinary care on the part of the master.

The question then is, if Graham was defendants' superintendent and had entire control of the work, with power to employ or discharge hands and to provide and remove material, whether he was a fellow-servant within the meaning of the term. If a workman or servant is to work in conjunction with others, he must know that the carelessness of one of his fellow-servants may be productive of injury to himself, and he must know that neither care nor diligence by the master can prevent the want of due care and caution on the part of his fellow-servants. The servant on entering upon the employment is supposed to know and assume this risk. But does he risk the carelessness and negligence of those placed over him, in the selection of suitable materials, machinery and the appliances incident to the employment?

He acts in subordination. His simple duty is obedience. He has no means or opportunity of knowing whether the articles furnished are safe, and has to rely on the judgment of his superiors.

If the master in person superintends the work, then there is no controversy or dispute as to where the responsibility belongs.

If the master deposes the superintending control of the work, with the power to employ and discharge hands, and purchase and remove materials, to an agent, then the master acts through the agent and the agent becomes the master. The duties are the duties of the master, and he cannot evade the responsibilities which are incident and cling to them by their delegation to another. When the master appoints some other person to perform these

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duties, then the appointee represents the master, and though in their performance he may be and is a servant to the master, yet, in those respects he is not a co-servant, a co-laborer, a co-employee, in the common acceptance of those terms.

He is an agent and stands instead of the principal, and is not a fellow-servant within the meaning of the rule as applied to laborers and workmen. His acts are the acts of a master and superior, and the servants are bound to use whatever materials, machinery, apparatus or appliances he may see fit to provide for them. This question was carefully considered in the case of *Harper v. Indianapolis & St. Louis Railroad Co.*, 47 Mo. 567, and decided in accordance with the doctrines above announced. In any view which I am able to take of the subject, I think that the instruction was right and that the judgment should be affirmed.

*Judgment affirmed.*

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CAPE GIRARDEAU, appellant, v. RILEY.

(23 Mo. 424.)

*Statute — omission of formal enacting clause.*

A State constitution provided that statutes should be preceded by the formal enacting clause, "Be it enacted," etc. *Held*, that the provision was directory merely, and that the omission of such clause did not invalidate a statute.

PETITION by the city of Cape Girardeau. The opinion states the case.

*Lewis Brown*, for appellant.

*Louis Houck*, for respondent.

WAGNER, J. The plaintiff's petition alleged an act of incorporation investing plaintiff with power to sue. A demurrer was interposed and sustained, and the important question that arises in the case is the validity of the act of the legislature incorporating the plaintiff as a city.

The objection taken is that there is no enacting clause to the law, and it is contended that this omission renders it wholly invalid. The constitution of this State (art. 4, § 26) declares that the style of the laws of this State shall be: "Be it enacted by the General Assembly of the State of Missouri as follows:" and we are now to determine whether the provision is imperative or directory only. There is no doubt as to the regular passage of the act, its approval by the governor, and its publication by the authority of the State.

In the early period of English history there was no fixed and certain style adopted in the passage of laws. It shifted and took different shapes in different reigns. But the most of the American States, when they entered upon a new order of things, adopted a style which they declared should be pursued.

The question is not one of construction, for the language of the constitution is clear and explicit, but simply one of application. How is this particular provision to be applied, and what shall be the consequence of a disobedience of its directions?

If the provision is to be held as directory only, and not mandatory, the rule is that it may be disregarded without rendering the act void. The rule declared by Lord MANSFIELD in *Rex v. Lozdale*, 1 Burr, 447, that "there is a known distinction between circumstances which are of the essence of a thing required to be done by an act of parliament, and clauses merely directory," has been followed by a long train of cases, and is now universally recognized. And where the language used does not import that it is of substance, the clauses of a law directing its observance are regarded as directory simply, for that is directory which is not of the essence of the thing to be done.

In the case of *The Pacific R. R. Co. v. The Governor*, 23 Mo. 353, which was an application for a mandamus to the governor, requiring him to issue the bonds of the State to a railroad company, under a law alleged by him to have been passed by the legislature over his veto, without the observance of the forms prescribed by the constitution, this court held that, notwithstanding the constitutional forms were not complied with, still the law was not void. In the opinion it is said: "The course required to be observed in the performance of an act is not always of its essence or vitality. When an act is directed to be done in a particular way, the direction may be merely directory—that is, it is not of the essence of the act, but the act may stand in law, notwithstanding the direction

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was not strictly observed. This is a familiar principle. \* \* \* All we design to hold is that there are forms to be observed in the enactment of laws; that the members of the legislature are sworn to observe those forms, and yet, if they are violated, the constitution never intended that their acts should be void."

The constitution uses the same language that it has employed in reference to the style of laws when it speaks of writs and process, and declares that they shall run in the name of the State, yet this clause has always been held to be directory. *Davis v. Wood*, 7 Mo. 165; *Jump v. Batton*, 35 id. 196; *Doan et al. v. Boley et al.*, 38 id. 450.

The very question presented arose in a case in Maryland. The constitution in that State is the same as ours in regard to the style of laws. A law was there passed omitting the required style, and it was decided that the constitutional provision was directory only and not mandatory, and that the omission of the enacting clause did not render the act unconstitutional and void. *McPherson v. Leonard*, 29 Md. 377. So in Mississippi, it is held that the provision is directory, and that it is not essential that there should be a literal adherence to the formula of words prescribed by the constitution, but that the acts need only show the authority by which they were adopted, and that it was the intention of the legislature that they should have the effect of laws. *Swain v. Buck*, 40 Miss. 268.

After a diligent search I have failed to find any case holding that a law was unconstitutional or void on account of an omitted or imperfect enacting clause.

The enacting clause is certainly not of the essence of the law. It furnishes no aid in its construction, and its provisions are as clear and intelligible without it as they are with it. It is not material in indicating by what authority the law was enacted, for, being passed in due form by both houses of the legislature and properly approved by the governor, with no allegation of suspicion attached to it, it comes before the courts bearing sufficient evidence that it is really and truly a law.

To hold that a law supported by these sanctions was not valid, because certain formal and immaterial words were omitted, would be sacrificing substance to mere form, which I think the court is not justified in doing.

Aside from these views, the act we are now considering does not

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pretend to be an original act. It is to reduce the law incorporating the plaintiff and the several acts amendatory thereof into one. The revision of a law does not have the effect of making the revised law entirely original, so as to be construed as though none of its provisions had effect but from the date of the revised law.

When a former provision is continued in a revised law, it operates only as a continuance of its existence, and not as an original act. *St. Louis v. Alexander*, 23 Mo. 309. The court, therefore, I think, erred in holding the act of incorporation set out in the petition invalid. The other questions raised in regard to the ordinances cannot be decided upon demurrer, if they are objectionable; the objection must be raised by answer.

Let the judgment be reversed and the cause remanded.

The other judges concur.

*Judgment reversed.*

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**SHEFFIELD, appellant, v. BALMER.**

(22 Mo. 471.)

*Contract—for advertisement in Sunday paper—violation of law not to be presumed.*

Plaintiffs contracted to publish an advertisement in the weekly (Sunday) edition of their paper for a year. *Held*, that as it did not appear, and was not to be presumed, that the contract contemplated any labor to be done on Sunday, it must be held to be valid.

**ACTION** on a contract. The opinion states the case.

*Amos M. Thayer*, for appellant.

*Horatio D. Wood*, for respondents.

This was a contract for the sale of merchandise on Sunday. *Smith v. Wilcox*, 24 N. Y. 353.

**VORIES, J.** This action was brought before a justice of the peace. The action was founded on the following agreement:



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"ST. LOUIS, *November 24th*, 1868.

"We agree to pay Sheffield, Eaton & Stone, publishers *St. Louis Home Journal*, five dollars per issue for publishing a one hundred (1-3 column) line advertisement for us in their weekly (Sunday) edition every Sunday for one year ; said advertisement to be changed at our option.

"BALMER & WEBER."

The plaintiffs recovered a judgment before the justice for \$155 ; from this judgment defendants appealed to the St. Louis Circuit Court. In the Circuit Court at special term defendants recovered a judgment, and from this last judgment the plaintiffs appealed to the general term, where the judgment was affirmed, and the plaintiffs appealed to this court.

It appears from the bill of exceptions, that on the trial before the special term of the Circuit Court plaintiffs read in evidence the agreement hereinbefore set forth, and then gave oral evidence tending to show that plaintiffs were partners in business under the name of Sheffield & Stone at the commencement of the suit; that after the contract read in evidence was executed, and prior to the suit, Mr. Eaton sold all his interest in the firm of Sheffield, Eaton & Stone to plaintiffs ; that the advertisement mentioned in the contract was published for one year from and after November 28, 1868, in the Sunday edition of the *St. Louis Home Journal*; that thirty-one publications of said advertisement, from and after April 17, 1869, remained unpaid for, amounting to \$155. The evidence tended to show that the advertisement was paid for up to April 17, 1869; that at that day plaintiffs were ordered to suspend the advertisement; that sometime prior to April 17, 1869, defendants had ordered a change to be made in the advertisement, which change plaintiffs did not make for the space of one or two weeks, but afterward made, and continued to publish the advertisement as changed until the expiration of the year ; that at the date of the contract two editions of the *Home Journal* were published, one edition was dated on Sunday, the other on Saturday; that, except as to the date, the editions were identical, but each was furnished to a different list of subscribers; that both editions were published on Saturday afternoon, and mailed on that day to subscribers ; that copies of the Sunday edition were sold to subscribers on Sunday morning at plaintiff's office. Further proof was offered

to prove that in January or February, 1869, the two editions were consolidated, but the paper retained the same name and appearance, was printed and mailed on the same day as before, and was sold on Sunday morning as before; that the thirty-one publications sued for were inserted in the consolidated edition, which was dated on Saturday; that plaintiff's failure to make immediate change in the advertisement desired by the defendant was occasioned by the wood-cut furnished by the defendants being too wide for the columns of the paper; that the change was made as soon as the wood-cut was cut down to fit the press; that all of the work performed on the paper was done on week days. The evidence also tended to prove that the plaintiffs were notified to suspend the advertisement shortly after plaintiffs had neglected to make the change in the advertisement as directed; that the defendants knew nothing about the consolidation of the Saturday and Sunday editions, until the trial of this case.

The court, at the close of the evidence, at the request of the plaintiffs, declared the law to be as follows:

"If the court find from the evidence that, after the consolidation of the two issues of the *Weekly Home Journal*, the defendants' advertisement was retained and published in such consolidated issue, therefore known as the Sunday edition, retained the same appearance, character and name, and was mailed to the same subscribers, and sold on the same days as before such consolidation; that is to say, if the court find that the consolidation amounted simply to the consolidation of the two lists of subscribers, and altering the date one day, without changing the name or time of publication of such paper, then such consolidation and publication of the advertisement in such consolidated issue was not a violation of the contract in evidence."

The court, at the request of the defendants, declared the law to be as follows:

"If the court believe, from the evidence, that, by the terms of the contract sued upon, the plaintiff agreed to publish advertisement in a newspaper of this State to be issued, sold, or circulated upon Sunday, the plaintiff is not entitled to recover."

To the giving of this instruction the plaintiffs at the time excepted. The court having found for the defendant, plaintiff in due time filed his motion for a new trial, stating as grounds for said motion that the court erred in making the declaration of law

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at the request of the defendant, and in giving judgment for the defendant, and other causes. This motion being overruled, they again excepted, and the cause is here to be reviewed.

It is insisted by the respondent in this court, that the contract sued on is void, being in violation of the 32d and 35th sections of Wagner's Statutes, page 504. It is contended, that by the contract the appellant agrees to violate said statute, and to do the acts prohibited thereby, and that the same cannot, therefore, be enforced by the law. There is no doubt but that, if the plaintiff has agreed to do any thing by the contract, which is prohibited by the law, and particularly where there is a penalty affixed to the doing of the act, the contract would be void, and no recovery could be had thereon ; but the question is, did the contract sued on require or contemplate the doing of an illegal act. The act referred to is as follows :

"§ 32. Every person, who shall either labor himself, or compel or permit his apprentices or servants, or any other person under his charge or control, to labor, or perform any work other than the household offices of daily necessity or charity, on the first day of the week, commonly called Sunday, shall be deemed guilty of a misdemeanor, and fined not exceeding fifty dollars.

"35. Every person, who shall expose for sale any goods, wares or merchandise, or shall keep open any ale or porter-house, grocery or tippling shop, etc., on the first day of the week, commonly called Sunday, shall, on conviction, be adjudged guilty of a misdemeanor and fined not exceeding fifty dollars."

The contract sued on does not require the plaintiffs, either expressly or by any necessary inference, to violate this statute. It is not required that an hour's work shall be performed on Sunday. The advertisement is required to be published in the weekly (Sunday) edition of the paper every Sunday. Now this may all be done, and the contract be completely performed, without violating the law by performing labor on Sunday in the least degree, and if the contract can be performed without any violation of law, then it is only a natural and legal presumption that it will be so performed, or at least there is no legal presumption that it will not be so performed, and in fact the evidence in this case shows, that the work in getting up, printing, and mailing, of the Sunday edition was always done on Saturday, so that the 32d section of the statute need not be violated by the performance of the contract unless it

would be unlawful to place the papers where subscribers could get and read them on Sundays, which I suppose will not be pretended.

But it is contended that the evidence shows that papers of this edition of the paper were sold on Sunday; and that such sale of the paper at the office of the plaintiffs was in violation of the 35th section of the statute above set forth. I will not stop to inquire whether such sale of newspapers comes within the prohibitions contained in the statute or not. It is enough for the present purpose to see that, by the terms of the contract, no such sale is required by the plaintiffs, or even remotely referred to. No one, after looking over this contract, will say that the plaintiffs could not completely perform the contract, on their part, without ever selling a single paper, either on Sunday or any other day; all that is contemplated by the contract is, that the advertisement shall be published in the paper and sent to the subscribers thereto. From this view of the case it will be seen that there is no evidence in the case upon which any instruction on the subject could be predicated. The contract does not admit of such a construction. The instruction says, that "if the court believes, from the evidence, that, by the terms of the contract sued on, the plaintiff agreed," etc. What evidence the court refers to, by which it is to believe that the *terms of the contract* are one way or the other, it is difficult to say. Surely the contract itself is the best evidence of its terms, and when we refer to it there is nothing in it to justify such a declaration of law. It seems that the case has been tried on an entire misconstruction of the contract. It is not, therefore, necessary to notice any further point in the case, but, for the reason aforesaid, the judgment ought to be reversed.

Judge WAGNER absent. The other judges concurring, the judgment is reversed, and the case remanded.

*Judgment reversed.*

## Field v. Stagg.

## FIELD v. STAGG, appellant.

(2d Mo. 534.)

*Consequence—deed executed without grantee being named—power authority to fill blank.*

A deed was executed with a blank left therein for the name of the grantee, and in that condition placed in the hands of an agent, with verbal authority to fill the blank. The agent did fill the blank with the name of a grantee in the absence of the grantor and delivered the deed. *Held*, that the deed was valid. (*See note, p. 439.*)

**ACTION** for money. The opinion states the case.

*P. E. Bland*, for appellant. The agent had not power to fill the blank without authority under seal. *Hibblewhite v. McMorine*, 6 M. & W. 213; 1 Greenl. on Ev., § 568; Starkie on Ev. (Sharsw. ed.) 456, note m; 2 Pars. on Cont. 723; *Cross v. The State Bank*, 5 Pike, 531; *Gilbert v. Anthony*, 1 Yerg. 69; *Wynn v. The Governor*, id. 149; *Lockhart v. Roberts*, 3 Bibb, 361; *Bank of Limestone v. Penick*, 5 Monroe, 25; *Harrison v. Tiernan*, 4 Rand. 179; *Byers v. McClannahan*, 6 Gill. & Johns. 253; *Perminter v. McDaniel*, 2 Hill, 267; *Davenport v. Slight*, 1 Dev. & Bat. 381; *McKee v. Hicks*, 2 Dev. 379; *Ayres v. Harness*, 1 Ohio, 173; *Pigot's Case*, 11 Conn. 27; *Starr v. Lyon*, 5 id. 540.

*R. E. Rombauer*, for respondent. The deed being perfect and complete before its delivery, it was valid. *Duncan v. Hodges*, 4 McCord, 239; *Inhabitants v. Huntress*, 53 Me. 90; *McDonald v. Eggleston*, 26 Vt. 161; *Speaker v. United States*, 9 Cranch, 28; *Drury v. Foster*, 2 Wall. 33.

**VORIES, J.** The plaintiff was the owner of certain lots in the city of St. Louis, upon which there existed certain mortgages or deeds of trust given by plaintiff to secure the aggregate sum of over \$3,000. The petition in this action charges, that plaintiff contracted with defendant to sell defendant said land or lots, and to convey the same to him in consideration of an amount named, and in further consideration that defendant assumed to pay and

discharge the incumbrances on said lots. That, after the agreements were so made, and the consideration, other than the payment of the incumbrances on the lots, paid by defendant, the defendant drew up a deed for said property, containing the agreement as to the discharge of the incumbrance as aforesaid, but that in said deed the name of grantee was left blank; that defendant requested the plaintiff to execute said deed with the blank therein as aforesaid; that the plaintiff consented to so execute said deed, provided the defendant would agree to fill the blank with the name of a solvent and responsible purchaser. That the defendant so promised, and that plaintiff then executed said deed and delivered it to defendant. That defendant, in violation of his agreement, without the knowledge or consent of plaintiff, filled said blank with the name of one Peter Boyce of Arkansas, who was unknown to plaintiff, and utterly insolvent then and has been ever since; that neither said Boyce nor defendant has ever discharged or paid off any of the incumbrances aforesaid, but suffered said lots to be sold under and by virtue of the same, for a sum insufficient to pay the same, by means of which plaintiff was compelled to and did pay off, as the remainder of said incumbrances, the sum of \$863, for which plaintiff prayed judgment.

The defendant in his answer denied the facts of the petition and charged that he had sold the lot as the agent of plaintiff, and that plaintiff knew that the deed was to be filled up with the name of Boyce, and that he was as well acquainted with Boyce as defendant was, and consented to have the blank filled with his name.

A jury was waived and the cause submitted to the court for hearing. Each party introduced evidence tending to prove the issues on his respective part. The defendant objected to the evidence of plaintiff in reference to the deed having been executed in blank, and also objected to the deed as evidence, on the ground that a deed executed in blank as to the name of the grantee, and filled up by verbal authority, was absolutely void. The court overruled the objection and the defendant excepted.

At the close of the evidence the court, at the instance of the plaintiff, declared the law to be as follows:

"If the court, sitting as a jury, believe and find from the evidence that the plaintiff executed a deed for the premises in the petition described, leaving the name of the grantee blank; that such deed contained covenants on the part of the grantee, as part

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of the purchase-money, to discharge certain incumbrances for which the plaintiff was personally liable; that the defendant expressly promised to plaintiff to fill the blank with the name of a solvent person before delivery, and thereafter filled said blank with the name of an insolvent person, and delivered it as the deed of plaintiff, in consequence whereof the plaintiff was damaged, then the plaintiff is entitled to recover in his action, and it is immaterial whether defendant did or did not know the insolvency of such person, if he could have ascertained the same by exercise of reasonable care and diligence."

The court declared the law at the request of the defendant that "If the deed from the plaintiff to Boyce was a valid deed, and its covenants binding upon the grantee therein, and if the defendant filled the blank for the grantee's name at the request of the plaintiff to fill the same with the name of a solvent person and then deliver the deed to that person, yet, the defendant is not liable for any damage resulting to the plaintiff because of the insolvency of the said grantee, if it appear in evidence that the defendant made inquiry and used reasonable diligence to learn the condition of said grantee as to solvency, and had reasonable ground to believe the said grantee to be solvent at the time the said blank was so filled, and the plaintiff cannot recover."

The following declaration of law was refused by the court and the defendant excepted: "The court declares the law to be, that if the deed offered in evidence by plaintiff was executed by him in blank as to the grantee; that after its execution he delivered it to the defendant with instructions to the defendant to fill in the blank with the name of a solvent person, and the defendant filled in the name of an insolvent person, and then delivered the deed to that person, the deed was void, and the grantee therein named was not bound by any of its covenants or recitals, and the plaintiff cannot recover, unless it appear from the evidence that the defendant was duly empowered by writing under seal, duly executed according to the requirements of law, to fill said blank."

The defendant also excepted to the opinion of the court in giving its first declaration of law asked for by the plaintiff.

The court found the issues for the plaintiff and rendered judgment in his favor for \$579.

The defendant in due time filed a motion for a new trial, setting forth as the cause therefor the opinions of the court excepted to.

This motion being overruled, defendant excepted and appealed to the general term of the St. Louis Circuit Court, where the judgment of the special term was affirmed, from which last judgment he appealed to this court.

The defendant and appellant raises several objections to the rulings of the court upon the trial of this cause, and also objects to the sufficiency of the petition filed by the plaintiff in the cause. But all of these objections resolve themselves into one and the same objection, stated or made in a different form. No demurrer was filed in the case, but an answer was filed taking issue upon the facts stated in the petition. It is, however, contended that an objection may be made to the petition, or advantage may be taken of the insufficiency of the petition, by objecting to the evidence in support thereof on the trial. This is very true, that in a proper case, where no cause of action is stated in the petition, the defendant may object to any evidence being introduced in the cause on that ground. *Syme v. St. Bt. Indiana*, 28 Mo. 335. The only ground on which the evidence in this case was objected to, was an objection to the evidence of the plaintiff in reference to the deed having been executed in blank, and defendant also objected to the deed as evidence, on the ground that a deed executed in blank as to the name of the grantee, and filled by verbal authority from the grantee, was void; nothing is said in the objection about the insufficiency of the petition. It is true that if such a deed would be absolutely void, the petition would be defective, and hence, I say that the objections and exceptions made and taken in this case, whether as to the admissibility of evidence, or as to giving or refusing of instructions, or to the refusal of the court to sustain defendant's motion for a new trial, all resolve themselves into one objection, which is called by the defendant's attorney the central question in the cause, and it might have been said the only question in the cause. This question is as to whether a deed regularly executed in other respects, with a blank left therein for the name of a grantee, and placed in that condition in the hands of a third person with verbal authority (but no authority under seal) from the person who executed it to fill up the blank in his absence and deliver the deed to the person whose name is inserted as grantee, and when said deed is so filled up and delivered, whether the same is void. If such a deed is held to be valid, then the objections to the petition, to make the most of them, are merely technical, and the



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petition would be good at least after the verdict; but if said deed would be absolutely void, then objection to the evidence was well taken, and the first instruction was improperly given, and the instruction refused was improperly refused, so that, as before said, all of the points made in the case resolve themselves into one single point.

It is stated by the defendant's counsel that the authorities in the different States of the Union are conflicting on this subject and not easy to be reconciled, and that the question is a new one in this State.

I will make no attempt at review of the authorities on this subject. In the case of *Drury v. Foster*, 2 Wall. 24, the question involved in this case was fully argued and examined. In that case a mortgage had been executed in blank, both as to the name of the mortgagee and the consideration (the mortgage was to convey the separate property of a married woman), which was afterward filled up in her absence by her husband. This deed was held to be void, but its invalidity was placed on the grounds that the woman "was disabled in law from delegating a person, either in writing or by parol, to fill up the blanks and deliver the mortgage." But Justice NELSON, in his opinion, says: "We agree that, if she was competent to convey her real estate by signing and acknowledging the deed in blank and delivering the same to an agent, with an express or implied authority to fill up the blanks and perfect the conveyance, its validity could not well be controverted. Although it was at one time doubted whether a parol authority was adequate to authorize an alteration or addition to a sealed instrument, the better opinion at this day is that the power is sufficient." In a late case decided by this court, this language of Justice NELSON is referred to or quoted with approval and fully recognized. *Burnside v. Wayman*, 49 Mo. 356. So that, although the authorities are somewhat conflicting in this country on this subject, this court has fully recognized the validity of deeds executed as the one in this case. It follows that the declarations of law as given by the court were properly given, and the declaration refused was properly refused.

Judge SHERWOOD not sitting. The other judges concurring, the judgment of the Circuit Court at general term is affirmed.

*Judgment affirmed.*

NOTE. — Compare *Preston v. Hull*, ante, 154. See, also, *Van Etta v. Evenson* (28 Wis. 33), 9 Am. Rep. 436, wherein it was held that mortgages were valid although the mortgagee's name had been inserted after execution, by an agent without authority under seal. See, also, *Voss v. Dolan* (108 Mass. 155), 11 Am. Rep. 331. A contrary doctrine was held in *Upton v. Archer* (41 Cal. 35), 10 Am. Rep. 396. See, also, note thereto, 397. — REP.

## McCORMACK v. PATCHIN, appellant.

(53 Mo. 33.)

*Municipal corporations — power to compel repavement of streets.*

The power to grade and improve streets is a legislative power, and is a continuing one, unless specially restricted by the municipal charter. It may be exercised from time to time as the needs of the corporation may require, and of the necessity and expediency of its exercise the corporate authority and not the court is usually to judge. It follows that the power to compel property owners to pave streets adjoining their lots, or the power of paving at the property owners' expense, once exercised, is not exhausted; but such owners may be compelled to repave or to pay for repavement when required by municipal authorities. (See note, p. 443.)

ACTION by Samuel C. McCormack, administrator, against Lyman Patchin and others, on a tax-bill assessed for local improvements.

Clayton F. Becker, for appellant.

Thomas Grace, for respondent. The city charter and the ordinance, in so far as they authorized the repavement of a street which had already been paved at the expense of the adjoining property owners, were invalid. *Hamnett v. Philadelphia*, 65 Penn. St. 146; 3 Am. Rep. 615; *People ex rel. Post v. Brooklyn*, 6 Barb. 209; *Pittsburgh v. Shaffer*, 66 Penn. St. 454. Local assessments are within the principle of eminent domain where they are not founded upon and measured by equivalent benefits. *In re Canal St.*, 11 Wend. 155; *Egyptian Levee Co. v. Hardin*, 27 Mo. 496; *Sheehan v. Good Samaritan Hospital*, 50 id. 155; 11 Am. Rep. 412; *Creighton v. Munson*, 27 Cal. 625; *Taylor v. Palmer*, 31 id. 252. Taxation must be just. *In re Washington Avenue*, 69 Penn. St. 362; 8 Am. Rep. 255; *Warren v. Henley*, 31 Iowa, 31. The question of benefits is judicial and for the costs. *Chicago v. Larned*, 34 Ill. 203; *Weeks v. Milwaukee*, 10 Wis. 258; *Creote v. Chicago*, 4 Chicago Leg. News, 106; *Thurston v. Joseph*, 51 Mo. 510; 11 Am. Rep. 463.

WAGNER, J. The sole ground of objection urged against the judgment in this case is, that the ordinance on which the special tax-bill was founded was unconstitutional and void. By that ordinance the city council of St. Louis ordered certain streets to be

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repaved, with what is known as the Nicholson pavement, and authorized the cost or expense of the work to be assessed as a special tax against the owners of the ground fronting on the streets where the work was done. The city charter clearly grants this power, but it is now insisted that this provision in the charter and the ordinance passed thereunder are unconstitutional, or, in effect, take private property for public use without making compensation, and that the power of paving at the property holders' expense, once exercised, becomes exhausted.

If the power to repave and assess the *costs* and expenses against the adjoining proprietors exists, the exigency which demands its exercise would rest primarily with the council, and would not ordinarily be under the supervision or control of the courts. Whether the power exists or is maintainable at all, is the only question.

The only cases which I have been able to find, sustaining the views urged by the appellant, are those decided in the Supreme Court of Pennsylvania. The first and principal case is *Hammett v. Philadelphia*, 65 Penn. St. 146; 3 Am. Rep. 615, in which a majority of the court held, that although the original paving of a street was a local improvement and within the principle of assessing the costs on the lots lying upon it, yet, when a street was once opened and paved, it was thereby assimilated with the rest of the city and made part of it, and all the particular benefits to the locality derived from the improvements were then received and enjoyed.

The learned judge who delivered the prevailing opinion discussed, with considerable fullness, the principle underlying the power to make assessments for local benefits.

The opinion consists mostly of generalizations in regard to established and well-admitted principles. It is perfectly true that it would be wholly beyond the scope of legislative power to authorize a municipality to levy a local tax for general purposes. The burdens of the whole community cannot be shifted to the shoulders of one man, who has only an interest in common with all the rest.

The whole theory of local taxation or assessments is, that the improvements for which they are levied afford a remuneration in the way of benefits. A law which would attempt to make one person, or a given number of persons, under the guise of local assessments, pay a general revenue for the public at large would not be

an exercise of the taxing power, but an act of confiscation. In effect it would be transferring the property from one individual to another. These are legal truisms, which have long been entertained and firmly established. The line of separation exists between local and general taxation, and the boundary which lies between them is not always very clear or definite.

The case of *Hammett v. Philadelphia* shows that it is difficult to draw the true line of distinction between these respective modes of taxation, and the judge who wrote the opinion of the majority of the court finally placed it upon the fact that the act which he was construing relieved the case of all difficulty, and showed upon its face that the special taxation authorized was avowedly for a general and not a local object.

The law was for the uses and purposes of the public, and not specially beneficial to any particular class. The power to grade and improve streets is a legislative power, and is a continuing one, unless there is some special restraint imposed in the charter of the corporation. It may be exercised from time to time as the wants of the municipal corporation may require, and of the necessity or expediency of its exercise, the governing body of the corporation, and not the courts, is the judge. *Hoffman v. St. Louis*, 15 Mo. 651; *Macy v. Indianapolis*, 17 Ind. 267; *Gall v. Cincinnati*, 18 Ohio St. 563; *Furman Street*, 17 Wend. 649; *Smith v. Washington*, 20 How. (U. S.) 135; *Plum v. Canal Co.*, 2 Stockt. 256.

As the power to tax and the power to make local improvements at the expense of the property benefited is, like all the other legislative power of the municipality, a continuing one, unless there be something to indicate the contrary, it follows that the power to compel the property owners to pave generally extends to compelling them to repave when required by the municipal authorities. *Dill. Munic. Corp.*, § 619.

In *Gurnee v. The City of Chicago*, 40 Ill. 165, the point was directly decided, and the court held that the power to repair or pave streets authorized a corporation to remove an old pavement and replace it with a new one of a different description, and assess the expense against the property holders fronting on the street.

The same doctrine is held by the court in Indiana. *City of Lafayette v. Fowler*, 34 Ind. 140. In the case of *The Municipality v. Dunn*, 10 La. Ann. 57, the city sued to recover a portion of the cost of repaving a street in front of defendant's lot. It appeared

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that the street had been previously paved at the expense of the property, but it was deemed advisable to replace the first pavement with one of a different material.

The defense was that, although the right to assess the property for the first pavement was given, yet the corporation had no right to compel a contribution from the same property for the second pavement. But the court decided that the power to pave the streets was a continuing power, to be exercised when the public good required it, and extended as well to the making of a new in the place of an insufficient pavement as to the one first built, the equity in both cases being regarded the same.

If the first paving of a street is a special benefit to the front proprietor, justifying the imposition upon him of a portion of the expense, so the removal of an insufficient pavement, and the making of a new and sufficient one in its stead, is a matter of special benefit to the front proprietor, although it may also be of general utility.

Every street, when it is opened and improved, is doubtlessly beneficial to the general public, but the property holder on the street receives a greater and additional benefit in the enhancement of the value of his property. If the street is permitted to get out of repair, so as to render it difficult or dangerous to travel, his property deteriorates as a consequence.

It is then for his advantage and benefit that the street should be repaired or re-constructed, and he receives a special benefit not shared by the public at large.

My opinion is that the law is not illegal, and that the judgment should be affirmed.

The other judges concurring.

*Judgment affirmed.*

NOTE.—See to same effect *Bradley v. McAtee* (7 Bush, 667), 3 Am. Rep. 309, and *Broadway Baptist Church v. McAtee* (3 Bush, 508), 3 Am. Rep. 480. Judge DILLON says in his able work on Municipal Corporations (§. 619): "Not only the power to tax, but the power to make local improvements at the expense of the property benefited, is, like all other legislative power of the municipality, a continuing one—unless there be something to indicate the contrary, and hence it is not exhausted by being once exercised. Therefore the power to compel property owners to pave ordinarily extends to compelling them to repave when required by the municipal authorities." The same doctrine is also enunciated in section 543, and the following authorities cited: *Smith v. Washington*, 20 How. (U. S.) 135; *O'Connor v. Pittsburg*, 18 Penn. St. 187; *Macy v. Indianapolis*, 17 Ind. 267; *Furman v. Street*, 17 Wend. 649; *Hoffman v. St. Louis*, 15 Mo. 651; *Markham v. Mayor*, 33 Ga. 403; *New Haven v. Sargent*, 38 Conn. 50; *Delphi v. Evans*, 36 Ind. 90; *Gull v. Cincinnati*, 18 Ohio St. 443. Compare *Lafayette v. Finler*, 34 Ind. 140; *State v. Jersey City*, 34 N. J. Law, 277. — REP.

**HELLER, plaintiff in error, v. SEDALIA.**

(88 Mo. 122.)

*Municipal corporations — fire department — fires, losses by — liability.*

A grant, by the legislature to a city, of power to establish a fire department confers a legislative or discretionary power, and does not render the city liable, if the power is exercised, for losses occurring through fires.\*

ACTION by Matthias Heller and others against the Mayor, etc., of Sedalia to recover the value of property alleged to have been lost through defendants' negligence.

*Snoddy & Bridges* and *F. P. Wright*, for plaintiffs in error. When a duty is enjoined upon an agent or servant of a municipal corporation which is purely ministerial, and is violated, or not performed, or negligently performed, so that an injury results, the corporation is liable to the party injured. *Wilson v. Peverly*, 1 Am. L. Cas. 465, and note, where the cases are collected; *Hilsdorf v. City of St. Louis*, 45 Mo. 94; *Ang. and Ames on Corp.*, §§ 885-888, and cases in the notes.

*Phillips & Vest*, for defendants in error.

ADAMS, J. The case comes here on demurrer to the plaintiffs' petition, which was sustained by the Circuit Court.

The suit originated in Pettis county, and was taken by change of venue to the Henry Circuit Court.

The petition alleges that the defendant, being a municipal corporation, was authorized by its charter to establish fire companies in the city and to pass by-laws and ordinances to prevent and extinguish fires; and the petition further alleges that the defendant did pass an ordinance establishing and regulating the fire department of the city, and under this ordinance one Isaac Graham was appointed chief engineer of the fire department, and accepted the appointment and entered on the duties of office at a salary of \$700

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\* See, also, *Fisher v. Boston*, 6 Am. Rep. 196; *Grant v. City of Erie*, 8 Id. 272, and note; *Jewett v. New Haven*, 9 Id. 382; *Torbush v. Norwich*, 9 Id. 390. — RER.

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per month, and that under the same ordinance one John B. Gallie was appointed chief of the fire department, and accepted the appointment and duly qualified as such, and entered on the duties of his office. The petition further alleges that the plaintiffs were the owners of a valuable brewery situated in said city, which, with the contents, was consumed by fire on the 25th day of March, 1869; and that their loss by fire amounted to \$31,000. The petition alleges that the fire might have been extinguished by proper exertions on the part of the officers of the fire department; and further alleges that the loss occurred by the negligence of the officers, etc., of the fire department, and claims that the city was liable for such loss. In my judgment the demurrer was properly sustained to this petition.

It was not the intention of the legislature, in conferring power on the city to establish a fire department, to render it responsible as an insurer for losses by fire. The power conferred was a legislative or discretionary power, which the city authorities might in their wisdom exercise or not. The creation of the fire department was not for the peculiar benefit of the corporation, but for the public. And the officers of this department, although appointed by the city, are public officers, and not agents of the city in the sense that renders the city liable for their acts or omissions of duty.

The doctrine of "*respondeat superior*" does not apply to this case, nor do the facts charged in the petition bring this within the numerous classes of cases where a city is held liable for injuries in the construction of public works, or the neglect of some specific duty, such as keeping streets in repair, whereby damages result to travelers, etc. Dill. Mun. Corp., § 774; *Wheeler v. Cincinnati*, 19 Ohio St. 19; 2 Am. Rep. 268; *Patch v. Covington*, 17 B. Monr. 722; *Brockmeyer v. Evansville*, 29 Ind. 187; *Wrightman v. Washington*, 1 Blackf. 39.

Let the judgment be affirmed. The other judges concur.

*Judgment affirmed.*

## BASSETT V. CITY OF ST. JOSEPH.

(28 Mo. 290.)

*Street — duty of municipal corporation to keep in repair — injury from defect in.*

Plaintiff was passing with due care along a street, which defendant was bound to keep in repair. In attempting to avoid the kick of a mule, she fell or jumped into an excavation upon the border of the street, and which, to the knowledge of defendant, rendered the street dangerous. *Held*, that the defendant was liable for the injury received.

ACTION by Nannie W. Bassett against the city of St. Joseph to recover damages for an injury happening through the alleged negligence of the defendant.

*Loan, Hall & Oliver and Hill & Carter, for appellant.*

*Chandler & Sherman, for respondent.*

VORIES, J. This action was brought by the appellant against the respondent, to recover damages for injuries sustained by the appellant, by reason of being precipitated into an excavation adjoining to, and extending into one of the public thoroughfares of the city, and which it is charged was, by the negligence of the respondent, left in an exposed and dangerous condition, so as to endanger the safety of persons in passing along said thoroughfare.

The action was originally brought by the appellant and her husband, Jonathan M. Bassett, but he having died after the commencement of the action, the suit was abated as to him.

The petition, after stating the incorporation of the defendant and its duty to keep the streets and public ways of the city in good repair, etc., charges in substance, that about the 26th of May, 1869, the defendant, not regarding its duties unlawfully, negligently and knowingly permitted a deep and dangerous excavation, extending into the public thoroughfare on the east side of Market square in said city, to be open and unguarded, to the great danger of all citizens passing along said thoroughfare and by said excavation; that the appellant in a lawful manner attempted to pass along said thoroughfare and by said excavation, when she was precipitated



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therein without any fault on her part. That she was greatly injured thereby and severely and permanently crippled; that said injuries were occasioned by reason of the negligent, careless and unlawful act of the respondent in knowingly permitting said excavation to be and remain in one of the most public thoroughfares in the city, in an open, unguarded and exposed condition, to the great damage of those passing by. Damages are claimed in the sum of \$20,000.

The defendant, by its answer, after denying the allegations of the plaintiff's petition, sets up the following as a defense to the action :

"Defendant, for further answer and defense to plaintiff's cause of action, states that one John Kirschner owned a lot of ground situate on corner of Felix street and an alley running and extending from north to south between Felix and Edmond streets, in the city of St. Joseph, said alley being immediately east of Market Square in said city ; that said Kirschner, wishing and intending to improve said lot and to erect buildings thereon, made an excavation on said lot adjoining said alley, for the sole purpose of laying a foundation for said building; that, after said excavation by said Kirschner had been made, and while said foundation was being built with all convenient dispatch (the said excavation being carefully guarded by day and during the night time), the said Nannie W. Bassett carelessly, negligently and with great rashness attempted to pass along said alley in front of said excavation, while the said excavation was necessarily unfenced in order that materials for said foundation might be (as they were actually being) placed in said alley, and in full light of day, and that she, the said Nannie W. Bassett, while attempting to so pass said excavation as aforesaid, in the day time as aforesaid, had and held in her hand a large basket, and a number of articles of bright tinware; that, while so attempting to pass as aforesaid, said Nannie W. Bassett came near to a mule standing near said excavation and near where said Bassett was then and there attempting to pass by said excavation, and said mule, by reason of the rattle and din of said tinware so carried by the said Bassett, as aforesaid, became frightened and either kicked the said Nannie W. Bassett into, or the said Nannie W. Bassett being frightened at said mule jumped into, said excavation, this defendant does not know which ; and that all the injuries received and sustained by the said Nannie W. Bassett were by, and resulted from, her careless and rash attempt to pass along as aforesaid by

said excavation, and her being thrown into said excavation as aforesaid, and not from any fault of defendant; that, at the time of plaintiff's attempt to pass said excavation as aforesaid, there was then and there another and safe way to pass by said excavation in full sight of said plaintiff, which she could have passed and traveled through without injury or danger to herself.

"Wherefore defendant avers that the plaintiff carelessly and negligently contracted whatever injuries she received without the fault of the defendant."

To this answer plaintiff filed a replication, in which she admits that Kirschner made an excavation on the lot described in the answer, but charges that said excavation extended into and obstructed the thoroughfare as stated in the petition, and denies all other allegations in the said answer.

Upon these issues the parties went to trial. The record in the cause presents a large mass of testimony offered by the parties on each side of the case, which it is not necessary to notice for the purposes of this case, further than to state that each party introduced evidence which tended to prove the issues on their behalf respectively. The evidence on both sides tended to prove that the plaintiff, in attempting to pass along the sidewalk connected with the public street or thoroughfare opposite to the excavation complained of, and between said excavation and a wagon standing in the street, to which was attached a pair of mules, was kicked at by one of the mules, and that she was either kicked into the excavation, or, in her effort to avoid the mule, was precipitated into the excavation.

At the close of the evidence the plaintiff moved the court to give the jury several instructions, all of which were refused. The court then, at the request of the defendant, instructed the jury as follows:

"It is admitted by the pleadings in this case that so much of the excavation complained of by the plaintiff in her petition, as was made upon the premises of John P. Kirschner, was for the sole purpose of erecting a building thereon and improving the same; and the court instructs the jury that said Kirschner had the right, during the time he was so building upon and improving his lot, to employ and occupy a reasonable portion of the street adjacent to said lot for a reasonable and necessary time for the purpose of aiding and facilitating said work.

"If the jury believe, from the evidence in this case, that there were sufficient barriers and obstructions in the street and sidewalks, around the said excavation at the time of plaintiff's alleged injury, to notify or warn the public of the existence of said excavation, the plaintiff was bound to exercise reasonable and ordinary care and prudence to avoid any accident or injury therefrom; and if they believe that plaintiff, in so attempting to pass by said excavation, was injured by being precipitated therein, which injury she might have avoided by the exercise of ordinary care and prudence they will find for the defendant.

"Unless the jury believe, from all the evidence in the case, that the excavation into which the plaintiff fell extended into the highway, and that said excavation was by the defendant carelessly, negligently and knowingly left unguarded at the time of the alleged injury to the plaintiff, they will find for the defendant."

To the giving of these instructions the plaintiff objected and excepted. The court then on its own motion instructed the jury as follows :

"The court instructs the jury that, if they believe, from the evidence, that one Kirschner on his lot near the Market square in St. Joseph, and which said lot is bounded on the north by Felix street, and on the west by the public thoroughfare, on the east side of said Market square, about the month of May, 1869, had excavated a cellar, and in so doing had extended the excavation to the west of said lot into said thoroughfare, and that said cellar, excavated as aforesaid, was negligently left without such protection as would prevent persons who were attempting to pass thereby from being precipitated therein, and that the city authorities had notice of the exposed condition of said thoroughfare; and if the jury further find from the evidence that the plaintiff, on or about the 26th day of May, 1869, in passing with ordinary care along said thoroughfare, was precipitated into said cellar and thereby injured, the jury will find for the plaintiff, and give damages for the full amount of the injury sustained, not exceeding \$20,000, unless they further find that said injury was caused solely by plaintiff's being kicked into said excavation by a mule, or that plaintiff, impelled solely by fear of being kicked or injured by a mule, jumped into such excavation and was injured thereby."

To the giving of this instruction by the court the plaintiff also objected and excepted.

After this the plaintiff suffered a nonsuit with leave to move to set the same aside. The motion to set aside the nonsuit was filed in due time, setting forth as grounds therefor the action of the court in giving and refusing instructions. This motion being overruled the plaintiff again excepted, and appealed to this court.

The only real questions presented by the record in this case for consideration in this court grow out of the action of the court in giving and refusing instructions to the jury. It is well settled in this State that it is incumbent on a city having full control of the streets therein, and of the improvements thereof, to keep them in a reasonably safe and good traveling condition. *Blake v. City of St. Louis*, 40 Mo. 569; *Bowie v. Kansas City*, 51 id. 454. And if it neglects so to do, it will be liable for all injuries happening by reason of its negligence. *Smith v. The City of St. Joseph*, 45 Mo. 449. But whether facts shown by the evidence in a particular case constitute negligence on the part of the city, or whether the injury complained of was the consequence of negligence on the part of the city, are questions which are not always so easy to determine; in fact, in those particulars each case will be found to depend so much upon the facts and circumstances with which it is surrounded that it would be very difficult to lay down any rule that would be applicable to all cases.

In the case under consideration there was evidence tending to prove the issues made by each of the parties; we therefore have nothing to do with the details of the evidence, or with its sufficiency to prove the particular facts to which it relates; but the simple questions to be determined are as to the legality of the instructions given and refused by the court.

The instructions asked for by the plaintiff and refused by the court need not be further noticed here than to say that the principles of law involved in them were contained in the instruction given by the court of its own motion, by excluding the qualification appended to said instruction by the court. The plaintiff does not complain of the principles of law, as presented by said instruction, in favor of the plaintiff's right to recover, but they do complain of the qualification given to those principles by the latter part of the instruction; of this matter I will speak hereafter.

The court, at the instance of the defendant, gave three instructions; of the two first no particular complaint is made in this

court, and they seem to be unobjectionable, if accompanied by proper instructions developing the other questions in the case.

The third instruction given by the court, at the instance of the defendant, tells the jury that unless they believe, from the evidence, that the excavation into which plaintiff fell extended into the highway, and was by the defendant carelessly, negligently and knowingly left unguarded at the time of the alleged injury to plaintiff, they will find for the defendant.

This instruction assumes that notwithstanding the excavation complained of was a dangerous one, and rendered travel on the highway passing thereby dangerous and hazardous, and notwithstanding the defendant knew of the dangerous condition of the street, and left it unguarded, and that in consequence thereof the plaintiff was precipitated into the excavation and was injured, yet, if the excavation did not actually extend into the highway, the plaintiff cannot recover. This cannot be the law. It would not be difficult to imagine many cases in which it would be as much the duty of the city authorities to protect the public, who travel its streets and highways, against dangers which do not actually form a part of the street, as it would be to protect them from obstructions or excavations forming a part of the street. A case may be supposed where a deep excavation was made on the border of a street or sidewalk, at the corner of the street where a sudden turn had to be made by travelers, and at a point where the ground or surface of the street descended, so that it was difficult for persons to keep a foothold while turning the corner, and this matter was known to the city authorities, would any one contend that it would not become the duty of the city in such a case to fix barriers to protect persons from being precipitated into such excavation; or that, if any person should under such circumstances be precipitated into such excavation and injured, without his fault, the city would not be liable to him for the damages? I suppose that such a thing would hardly be contended, and yet, if this instruction be correct, it would result that no recovery could be had in such case, because the excavation into which the plaintiff fell was just out of and at the edge of the street; and it would make no difference in such case if the petition should allege that the excavation extended into the street. Such variance would be immaterial and could mislead no one. All of the evidence in the present case shows most clearly that the excavation was either extended

into the highway a few feet, or came up to the edge of the highway. In such cases, if it renders travel dangerous, it is as much the duty of the city to protect the public against the danger in the one case as in the other; and it makes no difference in such case whether the excavation was made by the city or made by another, except when not made by the authorities of the city, they would not be liable until after they had notice of the dangerous condition of the street. In all such cases the question is a question of negligence, or no negligence, on the part of the city authorities, and this will depend on the other question, whether it was, under the circumstances of the case, the duty of the city to guard travelers against the danger. If the excavation, being outside of the street, did not render it dangerous to travel, and the highway still remained reasonably safe to travelers, it would not become the duty of the city to place either guards, or other protection, to prevent persons from falling into the excavation; and of course no negligence could be imputed; but whenever it begins to be the duty upon the part of the city to afford protection, then a neglect to perform the duty will create a responsibility upon the part of the city to those who may receive injury in consequence of such negligence, whether the injury is received by falling into an excavation that is in the street, or so near to it as to render it dangerous to those who travel upon the highway. *Alger v. City of Lowell*, 3 Allen, 402. The case of *Tisdale v. Inhabitants of Norton*, 8 Metc. 388, referred to by the defendant to sustain the doctrine of this third instruction, when properly considered, does not conflict with the view above taken of the law on the subject. In that case the decision of the court was placed wholly on the wording of the statute under which the prosecution was had.

The remaining question to be considered in this case is as to the propriety of the instruction given to the jury by the court on its own motion. By this instruction the jury are in effect told that although they might believe from the evidence that one Kirschner had made an excavation on his lot at the place named in the petition in this case; and that said excavation had extended into the public thoroughfare, and that said excavation had been negligently left without such protection as would prevent persons, who were attempting to pass thereby, from being precipitated therein, and that the city authorities had notice of the dangerous condition thereof, and although the jury might further find that plaintiff,

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about the 26th of May, 1869, in passing with ordinary care along said thoroughfare, was precipitated into said excavation, and injured thereby, yet if they should further find that said injury was caused solely by plaintiff being kicked into said excavation by a mule, or that plaintiff, being impelled solely by fear of being kicked or injured by a mule, jumped into such excavation, and was injured thereby, she cannot recover. This instruction, in other words, assumes that, although the jury may find the dangerous condition of the thoroughfare, and that the city authorities had notice thereof, the city, after notice, failed to take any measures to remedy the defect in the street, or to otherwise protect travelers against injury; and although the plaintiff was actually injured by being precipitated into said excavation, in attempting to pass said excavation, while traveling along said thoroughfare, without any fault or negligence on her part, she might under these circumstances recover, unless the jury further find that said injury was caused solely by plaintiff being kicked into said excavation by a mule, or that plaintiff, being impelled solely by fear of being kicked or injured by a mule, jumped into such excavation, and was injured thereby.

The language of this instruction, it seems to me, is calculated to produce in the minds of the jurors some confusion of ideas. If the excavation was then extending into the public thoroughfare, in a dangerous condition, and the plaintiff carefully traveling thereby and being frightened by a mule, when attempting to avoid the mule was precipitated or jumped into the excavation and was injured thereby, I cannot see how, in the nature of things, the kicking of the mule or the fright caused thereby could have been the sole cause of the injury. It is true that, if it had not been for the attempt of the mule to kick, the injury might not have occurred; and it is equally true that, if there had been no excavation at hand, the kicking of the mule would have been harmless. How can it be said, in such case, that either the one or the other of these circumstances was the sole cause of the injury; necessarily each cause contributed, but it took both causes combined to produce the injury. I suppose that the instruction was intended to convey the idea, that notwithstanding the negligence of the defendant in failing to provide safeguards for the protection of travelers who were passing obstructions in the street, if the primary cause of the injury was the kicking of the mule, or the attempt of the plaintiff to escape injury from the mule, no recovery can be had against the

defendant. Upon this subject the authorities are conflicting, and any attempt to reconcile the cases on the subject would be wholly fruitless. In the State of Maine, it has been held in a number of reported decisions, that in order to a recovery in such cases it must be proved that the injury was occasioned solely by the neglect of the defendant, and not by the neglect of the defendant, combined with another cause or accident. *Moore v. Inhabitants of Abbot*, 32 Me. 46; *Moulton v. Inhabitants of Sandford*, 51 Me. 127, and other cases might be cited to the same effect. In these cases it will be seen that the sole cause must be the negligence of the defendant, and that there must be no other accident combined with the negligence which contributed to produce the injury, and of course when another cause is combined neither can be the sole cause of the injury.

In Massachusetts, Illinois and Iowa the authorities are in conflict with those in Maine. In those States it has been held that the circumstance that the injury was partly the result of a defect in the street, and partly resulted from an accident unconnected with the defect in the street, and without any fault on the part of the plaintiff, would not prevent a recovery. *The City of Joliet v. Verley*, 35 Ill. 63; *City of Lacon v. Page*, 48 id. 499. And it has been so held even where the primary cause of the injury was a pure accident. *Palmer v. The Inhabitants of Andover*, 2 Cush. 600; *Mendersheid v. City of Dubuque*, 25 Iowa, 108; other cases might be cited to the same effect.

In the case of *Titus v. Inhabitants of Northbridge*, 97 Mass. 258, it is held that where a horse, by reason of fright, disease or viciousness, becomes actually uncontrollable, so that his driver cannot control him or direct his course, or exercise any control over him, and he in this condition comes in contact with a defect in the street or highway, or a place defective for want of railing, by which an injury is occasioned, the town is not liable, unless it appears that the injury would have occurred if the horse had not been uncontrollable; but it is expressly stated in the opinion delivered in that case, "that a horse is not to be considered uncontrollable that merely shies, or starts, or is momentarily not controlled by his driver."

The authorities on the subject are collected and commented upon by Mr. Angell in his work on Highways, §§ 293, and fol-



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lowing, by reference to which it will be found that no general rule can be deduced from the authorities.

In the case under consideration the injury took place upon a public thoroughfare, or immediately adjacent thereto; the highway was adjoining to and formed a part of a public square for marketing purposes; in such place it is not to be considered unusual for teams to be standing and moving on the public grounds; nor is it to be considered unusual that a lady might become frightened at the movement of mules or other teams. These things are to be expected in such places, and it is to guard against injuries which might occur from these usual occurrences that the authorities of the city are bound to keep the streets in a condition of safety. In order to the responsibility of the city for injuries received by persons while traveling on the streets or thoroughfares of the city, two things must concur:

First. That the thoroughfare was out of repair by the negligence of the city; and

Second. That the plaintiff, at the time of receiving the injury, was using ordinary care.

The courts in Maine seem to hold that it must also appear that the defect in the street was the sole and only cause of the injury; that if any accident or other cause concurred in producing the injury, no recovery can be had. We think that the cases in Massachusetts contain the better law; that if the street or sidewalk was out of repair, and after the city authorities were notified of the dangerous condition of the street or sidewalk, they carelessly permitted the street to remain in this dangerous condition, and the plaintiff, while passing along said thoroughfare, was precipitated into the excavation and injured, while using ordinary diligence and care on her part, and guilty of no fault (all of which facts are assumed by the instruction under consideration to be true), she would have a right to recover, notwithstanding the cause contributing to the injury was the attempt of a mule to kick plaintiff, and she, in attempting to protect herself from injuries about to be inflicted by the mule, fell or jumped into the excavation and was thereby injured.

If the street was not in a dangerous condition the city was guilty of no negligence in not protecting it with guards or railing; and if (as argued by the counsel for the defendant) the excavation was kept well guarded except for the purpose of introducing materials

to the building being erected, and this was done in a careful manner, then the city was guilty of no negligence, and if there was a plain way to travel, which was safe and the plaintiff could have traveled over it, and she voluntarily choose to take a hazardous way, which was known or could have been known by her with ordinary diligence to be hazardous, then she was guilty of contributive negligence, or at least these are facts from which contributive negligence might be found by the jury. All of these facts were proper to be submitted to the jury, from which they might find a want of negligence on the part of the city on the one hand, or contributive negligence on the part of the plaintiff on the other hand; but they are matters with which this court has nothing to do; we only say that the mere fact that the effort of the mule to kick plaintiff might be or was the primary cause of the injury is not, as a matter of law, sufficient to preclude the plaintiff from a right to recover.

We do not agree with the attorney for the plaintiff that the city is required or bound to keep all of her streets in good repair under all circumstances. She is only bound to keep such streets and such parts of the streets in repair as are necessary for the convenience and use of the traveling public. It may be, and doubtless is, the case that there are streets or parts of streets in many cities which are not at present necessary for the convenience of the public, that will be brought into use by the growth of the city, or there may be streets that have more width than is necessary for the present use or the requirements of travel. All that is required in such cases is that the city shall see that, as the streets are required for use, they shall be placed in a reasonably safe condition for the convenience of travel. When a street is opened for use it should be put in a reasonably safe condition.

It is further contended by the defendant that there is a variance between the allegations in the plaintiff's petition and the case made by the evidence; that the petition charges that a deep and dangerous excavation was unlawfully permitted to extend into the public thoroughfare; but the evidence and replication show that the excavation was not *per se* unlawful or careless on the part of the city; that it only became unlawful in the event that it was unlawfully permitted to remain without protection. This objection is extremely technical and cannot avail under our liberal system of practice and pleadings. The petition would at least be good after

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verdict, as it cannot be seen how any one could be surprised or misled by such a variance. *Reeves v. Larkin*, 19 Mo. 192; *Alger v. City of Lowell*, 8 Allen, 402.

For the reasons set forth in this opinion the judgment of the Circuit Court should be reversed.

Judgment reversed and the cause remanded.

*Judgment reversed.*

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**DAVIS, appellant, v. THE KANSAS CITY, ETC., RAILROAD COMPANY.**

(28 Mo. 317.)

*Carrier of passengers—right of passengers to seat before paying fare.*

Plaintiff bought a ticket on defendant's road from W. to B. Not being able to obtain a seat in the car, he refused to surrender the ticket and was ordered to leave the train on its arrival at F. At F. he obtained a seat and tendered his fare from there to B., but refused to either surrender his ticket or to pay the fare from W. The conductor ejected him. In an action for damages based upon the contract entered into at W., *held*, that under the contract plaintiff could not maintain the action.

It seems that a passenger on a railroad train who exhibits his ticket and demands a seat has a right to have that demand complied with before he can be required to surrender his ticket.

THE opinion states the case.

*Hill & Carter*, for appellant.

*Hall and Oliver & Stringfellow*, for respondent.

SHERWOOD, J. Oliver Davis brought suit in the Circuit Court of Buchanan county against the Kansas City, St. Joseph & Council Bluffs Railroad Company, and his petition is substantially as follows:

The first count alleges that defendant was an incorporated company, under the laws of this State, engaged in the transportation of passengers for hire, on the line of its road, from Kansas City

through St. Joseph to Council Bluffs, in the State of Iowa ; that plaintiff purchased of defendant on the 18th of October, 1870, a first-class ticket entitling him to a seat, in accordance with such ticket, in the cars of defendant, from the town of Winthrop to the town of Bigelow, on the line of defendant's railroad ; that defendant failed and refused to furnish sufficient accommodations, and its cars were so crowded that plaintiff could not procure a seat ; was compelled to stand, to his great pain, danger, etc., by being jolted and thrown about by the rapid motion of the cars against the arms of seats, etc., etc., although plaintiff was suffering at the time with great physical debility, and rheumatism, to his damage in the sum of \$5,000, for which judgment is asked.

The second count in its introductory matter is like the first, and charges that defendant, "after having carried plaintiff as such passenger in such cars" to a place about half way between Forest City and Bigelow, declined and refused to further carry or transport him, and ejected him without lawful excuse from its cars, in the night time, on an uninhabited prairie, while the night was dark, cold and rainy, whereby plaintiff was compelled to walk about five miles to the town of Bigelow, through mud and water, exposed to great danger, and his health impaired, etc.; to his damage in the sum of \$10,000, and judgment asked for that sum.

The chief portion of the answer of defendant is tantamount to a general denial ; it admits that plaintiff was a passenger on its road, but denies that he had purchased a ticket, and then, as a further defense, states that he went on board of the cars of defendant, and that while on said cars, between St. Joseph and Forest City, the conductor asked plaintiff for his ticket or his fare, which he wrongfully refused to deliver or pay to the conductor, who then informed him that he must get off at the next station, Forest City, and this plaintiff also failed to do, but remained on the cars, and upon being again called on for his ticket or his fare, wrongfully and without excuse refused to deliver the one or to pay the other ; and thereupon the conductor gently laid his hands upon him and put him off the train, after the same had been stopped near several dwelling-houses, using no more force than was necessary, etc.

The reply traverses all the chief allegations of the answer, and alleges the production and exhibition of the plaintiff's ticket to the conductor, and the offer by plaintiff to pay his fare, etc.

The testimony adduced at the trial of the cause discloses the

fact that the controversy which gave rise to this suit arose respecting a seat in the defendant's cars, to which seat plaintiff claimed he was entitled prior to surrendering his ticket or paying his fare.

He rides from Winthrop to St. Joseph on his ticket, which is punched or canceled in the usual way for that portion of the trip, and that train proceeding no further, the journey is resumed in the morning; and between St. Joseph and Forest City he is called upon for his ticket, but declines to surrender it until provided with a seat, stating that he would not pay fare and stand up. The plaintiff claims that he showed the conductor his ticket and told him, "when you get me a seat, I will give you the ticket," and that the conductor replied, "I will give you a seat as soon as I can get it;" and that the plaintiff then said, "then you can have the ticket." The conductor, however, states that he told the plaintiff that if he would pay his fare or surrender his ticket he would furnish him with a seat. Yet the accounts of both parties agree in this, that plaintiff is told that unless he pays his fare, or surrenders his ticket, he would have to get off at the next station, Forest City; but, instead of doing either, he remains on the cars until after that station is passed, secures a seat, and when called on the second time, he tenders his fare from Forest City to Bigelow, or as far as he had had a seat, and refuses to pay full fare from St. Joseph, or to surrender his ticket, and he is then, in consequence of such refusal, put off the train.

Various instructions were asked by the plaintiff and refused by the court, and several instructions given at the instance of defendant; to which action of the court plaintiff duly served his exceptions. But, in the view I take of this case, it is entirely unnecessary to examine into the correctness of the action of the court below in that particular, as I do not think that the plaintiff was, upon his own showing, entitled to a recovery.

There can be no doubt that a passenger on a railroad, who exhibits his ticket and demands a seat, has a right to have that demand complied with prior to the surrender of that which constitutes, in the very nature of the case, the best evidence of his contract with the company for safe and comfortable transportation. But it is equally true that he must adhere to and rely on that contract, or if there be a non-compliance with its terms in any reasonable and essential particular on the part of the company, he must abandon the contract and quit the train, so soon as suitable opportunity

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offers. He will not be permitted, as was attempted in this case, to grasp that contract's benefits with one hand, while he shirks and repudiates its burdens and liabilities on the other. And had the plaintiff, upon presentation of his ticket, and the refusal of a seat until he surrendered that ticket, abandoned his contract, and left the train at Forest City, a widely different question as to the liability of the railroad company might then have been presented. But instead of doing this he retains his ticket, remains on the train under his original contract, secures a seat at Forest City, and then, when called upon for his fare or his ticket a second time, tenders what is barely sufficient payment from the station where he is told to get off to the point of his destination. It was contended by appellant's counsel, in the argument, that plaintiff had a right to make a contract from Forest City to Bigelow; but, conceding the soundness of this position, it is not seen what possible bearing it can have on this case, for this suit is brought, not on any new contract, but on the one alleged to have been entered into at Winthrop.

For these reasons, without entirely sanctioning the action of the court below, as to giving or refusing instructions, I am of opinion that the judgment should be affirmed.

Judges WAGNER and NAPTON absent.

The other judges concur.

*Judgment affirmed.*

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CLEMENS, appellant, v. THE HANNIBAL AND ST. JOSEPH R. R. Co.

(88 Mo. 286.)

*Damages — railroads, negligence of — fire kindled from locomotive, presumption — speculative damages.*

Where grass is set burning by the fire escaping from a locomotive, and the owner sues the company, negligence on the part of defendant will be presumed from the escape of the fire, and it devolves upon it, in order to rebut this presumption, to show that proper and safe locomotives and engines were used, and were conducted by the servants of the company in a proper and safe way. In such case the damages claimed would not be held too remote or speculative, although the property consumed was separated from the track by a strip of ground forty or fifty yards wide, where the plat was covered with dry grass and other combustible matter.

Where doubt arises as to whether damages are proximate or remote, the issue should be presented to the jury by proper instructions.

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**ACTION for damages.** The opinion states the case.

*S. P. Huston*, for appellant. I. The negligence of the respondent was sufficiently shown to make at least a *prima facie* case. Shearm. & Redf. on Neg. 396, § 333; Redf. on Railroad, 465; 42 Ill. 407; 45 Mo. 222; 46 id. 456. II. The damages are not too remote. Shearm. & Redf. on Neg. 667, 669, §§ 594, 596; Sedgw. Meas. of Dam., marg. pp. 58 and 59; *Sharp v. Powell*, 2 Eng. 537; *Kellogg v. R. R. Co.*, 7 Am. Rep. 69; 26 Wis. 223; *Flynn v. The San Francisco R. R. Co.*, 6 Am. R. 595; *Toledo, etc., R. R. Co. v. Pindar* (53 Ill. 447), 5 Am. Rep. 57.

*James Carr*, for respondent. I. The appellant is not entitled to recover without showing negligence; this he totally failed to do. *Smith v. Han. & St. Jo. R. R. Co.*, 37 Mo. 287. II. The damages are too remote. *Penn. R. R. v. Kerr*, 62 Penn. St. 353; 1 Am. Rep. 431; *Ryan v. New York Central R. R.*, 35 N. Y. 210.

**VORIES, J.** This action was brought to recover damages for the burning of the plaintiff's fencing and meadows by the carelessness of defendant's employees.

The petition is in the usual form, charging that the defendant was a corporation owning a railroad running near the plaintiff's farm, and that, while defendant's locomotive and cars were being run past and near plaintiff's farm, by the carelessness of the defendant's servants and agents having charge of said locomotive and cars, fire was permitted to escape therefrom, which set fire to plaintiff's fencing and meadow, by which he was damaged; and he claimed judgment therefor.

The defendant's answer admits that it is incorporated, and that it operates and runs locomotives and cars on its road, etc., but denies the negligence of its servants, and all other material allegations in the petition.

The evidence given for the plaintiff on the trial tended to prove that plaintiff owned a farm in Linn county, State of Missouri; that defendant's railroad passes near said farm; that, at the place where the fire is charged to have taken place, there is a strip of land lying between the railroad and plaintiff's farm and fence, from eight to ten rods wide; that this strip, at the time of the fire, was covered with dry grass; that, as the cars and locomotive of

the defendant passed, at the time named, fire escaped therefrom, and set fire to this grass and combustible matter on this strip of land opposite to the plaintiff's field ; that the fire was started about twenty feet from the track of the road, and extended to plaintiff's field and meadow, and consumed his rails and hay, which were of the value of over \$100 ; that owing to the grass, and its dry condition at the time, though good efforts were made to stop the fire, it could not be stopped by plaintiff and others until after it communicated with plaintiff's field and burned the same. After plaintiff had given evidence to prove the facts above stated, he closed his case, when the defendant moved the court to instruct the jury, "That, admitting all the evidence adduced by the plaintiff to be true, the plaintiff has made no case, and they will find for the defendant." This instruction was given by the court, after which the plaintiff took a nonsuit, with leave to move to set the same aside.

In proper time the plaintiff filed his motion to set aside the nonsuit taken, and to grant the plaintiff a new trial, assigning as a reason therefor the action of the court in instructing the jury to find for the defendant. This motion being overruled, the plaintiff excepted, and appealed to this court.

The only question presented here is whether the facts proven in the case, or the facts which the evidence tended to prove in this case, were sufficient to make a *prima facie* case in favor of the plaintiff. The counsel for the defendant insists that it was necessary for the plaintiff to introduce some evidence of negligence on the part of the servants of the defendant's other than that the fire had escaped from their locomotive which burned the plaintiff's fencing ; that there must be some direct evidence tending to show negligence, in addition to the evidence that the fire had escaped from the locomotive of defendant, while it was passing near plaintiff's field. There is no doubt that the authorities are conflicting on this subject. In some courts it has been held that evidence of actual negligence must be shown, while in other States it has been held that negligence may be found by the jury from the fact that the fire escaped from the locomotive that caused the injury, and that it devolves on the defendant in such case, in order to rebut the presumption of negligence, to prove that it was using proper and safe locomotives and engines, and that its servants were conducting them in a proper and safe way. I think that the latter doctrine is



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the correct one. We may safely presume that railroad companies are not running locomotives on their roads, the natural or probable effect of which would be to set fire to the farms of those who resided along the road, if they were carefully managed : from which the natural presumption would be, that when fire escaped and burned up the farms along the road, it proceeded from negligence. If it should be held otherwise, it would amount to a denial of justice to those who were injured by such fires. It would be in most cases wholly impossible for the farmer who was injured to be able to tell how the servants of the company were conducting the business and they would be in most cases wholly ignorant by what witnesses the facts of negligence could be proved. These are facts that would be peculiarly within the knowledge of the defendant and its servants. In such cases the *onus* should devolve on the defendant to prove how it and its servants were conducting its business at the time the fire escaped. The question is now, I consider, well settled in this State. In *Smith v. The Han. & St. Jo. R. R. Co.*, 37 Mo. 287, it was held, in a case very similar to the one now being considered, that there must be evidence of negligence produced by the plaintiff before he can recover, in addition to the evidence of the escape of the fire and the injury occasioned thereby. The same question has however been before this court in two cases subsequent to the case of *Smith v. The Han. & St. Jo. R. R. Co.*, in both of which it was held that the fact that the fire which caused the injury sued for was set by or escaped from a railroad engine, would be *prima facie* evidence of negligence on the part of those who ran it, or who provided the engine, and that the burden would be thrown on the defendant in such case to exonerate itself by showing the want of negligence. *Balford v. The Han. & St. Jo. R. R. Co.*, 46 Mo. 456; *Fitch v. The Pacific R. R. Co.*, 45 id. 322. It is believed that the current of American authorities is to the same effect.

The next point made by the respondent to sustain the action of the court which tried the cause in instructing the jury to find for the defendant is, that the damages proved are too remote ; that there was no connection between the fire emitted from the engine and the burning of the plaintiff's fence and field ; that the cause of the injury is not immediate but remote. The general rule is that every person is liable for the natural and usual consequences of his own acts, but not for the remote or unusual damages. It is

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sometimes difficult to fix the line between damages that are the proximate or remote consequences of a wrongful act; hence the decisions on this subject are not always in harmony with each other; but in the case under consideration there seems to me to be no difficulty. Here the fire escaped on to and upon a strip of ground some forty or fifty yards wide, which was covered over its entire surface with dry grass and combustible matter. It was a natural and, I might say, a necessary consequence that the fire would extend to and burn the plaintiff's fence. The evidence shows that this result could not be prevented, although efforts were made to do so. The fire, by its natural extension, extended to and burned plaintiff's fence. When the result of an unlawful act is a natural one, one that would ordinarily flow from the act done, it is not remote but proximate. If, on the contrary, the damage complained of would not naturally or usually flow from the negligent act, but was brought about by some sudden storm, or other unforeseen casualty, then the damages would be too remote. But where the fire, as in this case, would necessarily extend to plaintiff's field and burn his fence, the damages are sufficiently proximate, and are the natural result of the negligent act, if negligence should be found by the jury; and if there was any doubt as to whether the loss to the plaintiff was the direct or natural result of the negligent act, that fact should have been submitted to the jury under proper instructions. *Miller v. Martin*, 16 Mo. 508; *Toledo R. R. v. Pindar*, 53 Ill. 447; 5 Am. Rep. 57; *Perley v. Eastern R. R.*, 98 Mass. 414; *Kellogg v. The Chicago & N. W. R. R.*, 26 Wis. 223; 7 Am. Rep. 69, and cases there cited. The cases of *Pennsylvania Railroad v. Kerr*, 62 Penn. St. 353; 1 Am. Rep. 431, and *Ryan v. New York Central R. R.*, 35 N. Y. 210, relied on by respondent, must be considered as extreme cases, depending upon the peculiar facts surrounding them, and are not sufficient to overturn the authority or reason of the cases aboved referred to.

The judgment is reversed, and the cause is remanded.

*Judgment reversed.*

AYERS, plaintiff in error, v. MILROY.

(88 Mo. 512.)

*Surety — to non-negotiable paper — condition of signature.*

Defendant signed a non-negotiable promissory note as surety, upon the express condition that a certain other person should sign as co-surety. The signature of the latter was not obtained. *Held*, that defendant was not liable to a holder in good faith and without notice.

ACTION on a non-negotiable promissory note. The opinion states the case.

*Minor & Foster and Anderson & Niel*, for plaintiff in error.

*Fugg & Dyer*, for defendant in error.

WAGNER, J. This was an action commenced upon a non-negotiable promissory note against the defendant.

The defense set up in the answer was that Milroy, the defendant, signed the note as surety for one Jones, upon the express understanding that Jones was also to procure the signature of D. P. Dyer as an additional security, and that, if the name of Dyer was not obtained, then he was not bound; that Jones did not get Dyer to sign the note, and that plaintiff had full notice of this condition before he received the note.

It seems that Jones took the note, and, without getting Dyer to sign it, he delivered the same to plaintiff. The court below found for the defendant, but its verdict appears to have been based on the fact that the plaintiff had notice of the condition upon which defendant signed the note. It is now contended that there was no evidence adduced to show that plaintiff had any such notice, and if there was no such notice, then the verdict and judgment are against the law.

An examination of the record forces upon my mind the conclusion that there was, in fact, nothing to bring notice home to the plaintiff of the agreement upon which the note was signed by the defendant. But it is conceded throughout the whole case that there was such an understanding, and that defendant signed the

note as surety, upon the express condition that Dyer was also to sign it, and that Jones was not to deliver it to the payee till Dyer's signature was obtained.

The question then is whether the defendant is liable where the condition was not complied with, though the plaintiff had no notice of the fact when he took the note.

In the case of negotiable or commercial paper it is very clear that the defense would not be held good.

In a suit upon a note of that character it was expressly adjudged by this court in the *Bank, etc. v. Phillips*, 17 Mo. 29, that it was no defense for an indorser who was sued upon a note, that he indorsed it upon the express condition that it should also be indorsed by another person, when it did not appear that the plaintiff knew of the condition.

In making this line of defense there is a clear distinction recognized between bonds or other instruments that are not negotiable and those which are negotiable.

The question here presented has often been before the courts, and the almost universal holding has been, that where a bond or other instrument for the payment of money is executed by a surety on the condition that another person shall also sign it as surety, and that if not so signed, then the principal obligor shall not deliver it, and the obligor does deliver it in violation of this agreement, then the surety who signed will not be bound.

In the case of *State v. Sandusky*, 46 Mo. 377, we quoted approvingly the rule laid down by the Supreme Court of Massachusetts in *Cutter v. Whittemore*, 10 Mass. 442, where JACKSON, J., speaking for the court, said: "If there had been any agreement or condition at the time that it should not be delivered as their deed unless a third person named as obligor should also execute it, this would show that it was only delivered as an escrow."

In *Linn County v. Farris*, 52 Mo. 75, *ante*, the principal procured the signature of a surety on the bond, the surety signing it on condition that another person should likewise be procured to sign it, but the other person's signature was not procured and his name was forged on the bond, and the principal then delivered it. In an action on the bond it was decided there was no delivery as to the surety, and that the bond was void as to him.

In the case of *Lovett v. Adams*, 3 Wend. 380, the defense was that the bond had never been delivered by the obligors, and the fact

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was offered to be proved by a co-obligor. The witness was rejected. In delivering the opinion of the court, SAVAGE, C. J., said: "If a bond be signed and put into the hands of the obligee or a third person, on the condition that it shall become obligatory upon the performance of some act by the obligee or any other person, the paper signed does not become the bond of the party signing the same until the condition precedent be performed. Until then there is no contract."

In *Bronson v. Noyes*, 7 Wend. 188, a bond was given to the sheriff on an arrest. The sheriff said to the party signing, "Sign the bond, and he will get some other person to sign with you, or get other bail in the morning." It was said by the court (NELSON, J.): "If it was the agreement of the parties at the time it was put into the hands of the officer, that it was not to be delivered to take effect until additional bail was procured, then, whatever might be the intention of the defendant, the bond would be inoperative and have no legal existence."

In *Leaf v. Gibbs*, 4 Car. & P. 466, it was decided that when a person signs a promissory note on a representation that others are to join, and one afterward refuses to sign, the payees cannot recover in an action on the note against the person who signed it, unless the jury are satisfied that such person, knowing the facts and being aware of his rights, had consented to waive his objection.

TINDAL, Ch. J., in summing up the case to the jury, uses this language: "It seems, from the evidence of plaintiff's witnesses, that the defendant was told that his mother was to join, and therefore the obtaining of her signature was a condition which, if not carried into execution, would justify the defendant in withdrawing, and if matters have not been altered since the signing of the note, the defendant will not be liable."

There was a verdict for defendant.

In *Perry v. Patterson*, 5 Humph. 133, it was held that, where a bill was delivered to the creditor by an obligor as surety, upon condition that another should sign as co-surety, it was delivered as an escrow, and was not obligatory unless the condition was complied with, or unless he agreed that it should be obligatory upon him after his knowledge of the refusal of the other to sign as co-surety.

It was also further held that when delivered as an escrow by a surety to the principal obligor, and by the latter to the creditor absolutely and without condition, the ignorance of the creditor does

not discharge the condition and constitute the delivery a valid delivery. It was the business of the creditor to have informed himself of the facts connected with the delivery.

The court observes, "the law upon this point is settled beyond controversy, and needs at this day no investigation." So in Alabama (*Bibb v. Reid*, 3 Ala. 88) it was decided that a bond may be delivered conditionally to a co-obligor, and will not be operative as a deed of the party until the condition is performed.

The court, speaking through ORMOND, J., who wrote the opinion, say: "We are satisfied that on principle there can be difference between a conditional delivery to a stranger or a co-obligor; that in either case the deed cannot be operative until the condition is performed, and such is clearly the weight of authority at the present day."

In the *State Bank at Trenton v. Evans*, 3 Green (N. J.), 155, the subscribing witness to a bond testified that at the time of its execution by the defendant he said: "This bond is not to be delivered till signed by all the persons named therein;" and upon inspection of the bond it appeared that one of the obligors had not signed it. It was held that the bond could not be received in evidence. It was also decided in the same case that whether a party says, "I deliver this writing as my deed in the confidence that you will not deliver it to the grantee until a certain condition be performed," or whether he says, "I deliver it to you as an escrow, to take effect as my deed upon a certain matter being done," it is in either case an escrow, and will be inoperative in the hands of the party, by whatever means he may get possession of the instrument, until the condition is performed. It is the performance of the condition, and not the second delivery, that gives it vitality and existence as a deed. In this case the bond was delivered to the obligor, for whose benefit it was signed by the defendants. The same condition was made a part of the execution as in the case under consideration, and it was not to be used until signed by all, who, by the arrangement, were to become parties to it. HORN-BLOWER, Ch. J., who delivered the opinion of the court, after reviewing many of the authorities, remarks: "It is evident that the word 'stranger' is used by Lord COKE in opposition to the party to whom the deed is made. A delivery to a co-obligor without words would give no more effect to the instrument than delivery to a stranger with words." RYMERSON, J., also delivered an opinion, and argued

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that there was no delivery, as delivery implied that the party who had sealed had given up control of the writing to, and for the use of, the other party. He said "the intention to deliver, which is the essence of the transaction, is wanting. The intention to deliver this writing was never formed, but one quite different." \* \* \*

A mere parting with the actual possession of a writing is very different from a legal delivery, which is to give it operation as a deed.

Delivery is necessary to the complete execution of a promissory note, and if the payee obtain possession thereof by fraud or any unauthorized act, he cannot maintain an action on it. *Carter v. McClintock*, 29 Mo. 464. There must not only be a delivery, but it must be with an intention to deliver, and by one who has a right to deliver.

In *Pepper v. The State*, 22 Ind. 399, it is held that where a bond is presented by the principal in it to several persons, and their signatures as sureties for him are solicited by him, and he represents to them, severally, that before its delivery he will procure the signatures of a certain number of other persons as sureties, or of certain named persons, and some of them are induced by such representations to sign it, and others sign it upon condition that such other signatures shall be procured, and such other signatures are not procured, those persons who signed upon condition may show these facts in defense to an action on the bond.

So in the case of *The People v. Bostwick*, 43 Barb. 9, where a bond for the payment of money was executed by several persons at the same time, as sureties, upon the representation that another person would sign it as co-security, and with the understanding that one of the obligors was to take the bond, but was not to deliver or use it until after it was signed by the other person, it appeared that some of the sureties would not have signed the bond, except on the condition that the additional surety should be obtained, and that they did not otherwise authorize its delivery. The obligor, to whom the bond was given, delivered the same to the obligee without having procured the signature of the other designated surety. The court held that there was no valid delivery of the bond — that it was incomplete, and the transaction was not consummated — and that the condition on which the instrument was executed not having been performed, the obligors were not liable.

This last case was affirmed on appeal in 32 N. Y. 445, and

DENIO, J., there said, that "the principle, that where one of two innocent parties must suffer, he who has put it in the power of a third person to commit the fraud must sustain the loss, is not one of universal application, if the language be taken in a popular sense. In such cases the one who claims the benefit of the rule must not himself be guilty of negligence."

The cases just cited from 22 Ind. and 43 Barb. contain exhaustive and elaborate reviews of the authorities on the question, and they will be found overwhelmingly to sustain the views herein presented. Indeed, with the exception of *Millett v. Parker*, 2 Metc. (Ky.) 608, I have found no direct case to the contrary. The same doctrine seems to be settled in the Supreme Court of the United States. In *Pauling v. The United States*, 4 Cranch, 219, it was held that a bond may be delivered as an escrow by the surety to the principal obligor, and if one of the obligors, at the time of executing the bond, in the presence of the obligors, say, "we acknowledge the instrument, but others are to sign it," this is evidence from which the jury may infer a delivery as an escrow by all the obligors who are present.

In *The United States v. Leffler*, 11 Pet. 86, in an action of debt upon a joint and several bond, the principal had confessed a judgment for the amount. The United States proceeded against the other defendants, and upon the trial the principal of the bond, having been released by his co-obligors, was offered by the defendants, and admitted by the court, as a witness, to prove that one of the co-obligors had executed the bond on condition that others would execute it, which had not been done. The Circuit Court admitted the evidence, and it was held on appeal that there was no error in the decision on the trial.

The case directly involved the principle now presented for consideration and is an authority in favor of the doctrine that such a defense as is interposed in the present case is available.

The plaintiff here occupies the position of taking a security, to which the party giving it had no title.

The defendant was merely a surety, and derived no benefit from the contract. If the rule of principal and agent applied, then the defendant would only be liable for such acts as he authorized.

The power conferred in this case was conditional, and the condition not being performed upon which its exercise depended, and it being entirely unauthorized, the principal would not be bound. The rule is settled, that an agent cannot bind a party contrary



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to his instructions, and a special authority must be strictly pursued.

In the case at bar, there was no delivery of the note, upon which this action was brought, by the surety who now defends. It was simply left with Jones, on condition that he should not use it for the purposes intended until after he had obtained the signature of another party. It was therefore incomplete, and the transaction was not consummated. Under such circumstances, both upon principle and authority, the surety who signed the note is not liable until the condition is fulfilled.

I am of the opinion, therefore, that the judgment should be affirmed. The other judges concur, except Judge SHERRWOOD, who is absent.

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STATE V. CLARKE, appellant.

(54 Mo. 17.)

*Statutory construction—Municipal charter—Licensing of bawdy-houses.*

A statute made the keeping of a "bawdy-house or brothel" a misdemeanor. A municipal charter, subsequently granted, authorized the city council "by ordinance, not inconsistent with any law of the State, \* \* to regulate or suppress bawdy-houses." *Held*, that the charter operated as a repeal *pro tanto* of the statute, and that an ordinance licensing bawdy-houses was valid.

INDICTMENT of Kate Clarke for keeping a bawdy-house, in violation of the statute. Plea, a license under the city ordinance of St. Louis.

The statute under which the indictment was found (Gen Stat., § 19, p. 718) was as follows: "Every person who shall set up or keep a common gaming house or a bawdy-house or brothel shall, on conviction, be adjudged guilty of a misdemeanor, and punished by a fine not exceeding \$1,000." Subsequent to the passage of this act, and in 1870, the charter of the city of St. Louis was revised, and, as revised, contained among other provisions the following: "The mayor and city council shall have power within the city, by

ordinance, not inconsistent with any law of the State, first, to levy and collect taxes for general or special purposes on real and personal property and licenses," and then, after conferring a number of other specified powers, the act proceeds: "Tenth, to license, tax or suppress ordinaries, hawkers, peddlers, pawnbrokers, money changers, intelligence offices, public masquerade balls, street exhibitions, sparring-exhibitions, dance-houses, fortune-tellers, pistol galleries, lottery ticket dealers, corn doctors, look, private and venereal hospitals, museums and menageries, equestrian performances, horoscopic views, lung-testers, muscle-developers, magnifying glasses, billiard tables or any other tables or instruments used for gaming, theatrical and other exhibitions, shows and amusements, tippling houses, dram-shops, gift enterprises, and to suppress prize-fighting, coon-fights, dog-fights, chicken cock fights, gaming or gambling houses, and to regulate or suppress bawdy or disorderly houses, houses of ill-fame or assignation."

The other facts are stated in the opinion.

*Lackland, Martin & Lackland and J. G. Lodge, for appellant.*

*M. W. Hogan & Henry Hitchcock, for respondent.*

NAPTON, J. This was an indictment under the general statutes against defendant for keeping a bawdy-house. The defendant pleaded a license from the city authorities under an ordinance, chap. 14, passed by the mayor and common council, and it is conceded that the license is in proper form and was authorized by the ordinance. The court of Criminal Correction, however, held the defense to be unavailing, because the ordinance was not valid. And the only question in the case is, whether the city authorities had power under their charter to pass this ordinance. The language of the charter is, that the city shall have power to "regulate or suppress bawdy-houses." It would seem that, resting on these words alone, a doubt would hardly be entertained as to a grant of the power; but at the beginning of section 1, of article 3, in which this grant is made, the legislature uses these words: "The mayor and city council shall have power within the city, by ordinance, not inconsistent with any law of the State, first to levy and collect taxes," etc., and then proceeds to a specific enumeration of the

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several powers granted, in all nearly twenty, and embracing a great variety of subjects. The ninth of these clauses is to "license, tax and regulate auctioneers," etc. The tenth is to "license, regulate, tax or suppress ordinaries," etc., and "to suppress prize-fighting," etc., and "to regulate or suppress" bawdy-houses.

It is clear, that the legislature understood the difference between regulation and suppression, and whilst they only conceded to the city the power to suppress prize-fighting, gambling houses, etc., they allowed the city to either suppress or regulate bawdy-houses.

Now, by the general law of the State, long before the passage of this charter, and since, bawdy-houses are totally prohibited and declared nuisances, and their keepers are indictable, and on conviction heavily punished, both by fine and imprisonment.

And so, in the various charters granted to the city of St. Louis previous to 1870, the authorities of the city had only power to suppress these houses. There was in the charter of 1839 and 1841 a power given to tax, restrain, prohibit, and suppress, but, from 1841 down to 1870, the power was simply to suppress.

The change in 1870 was a significant one, and undoubtedly meant a change in the policy of the legislature — very easily accounted for from the fact that St. Louis had become a large city with nearly half a million of inhabitants — and the legislature then deemed it advisable to throw upon the authorities of the city the responsibility of deciding what legislation would best promote the morals and health of the city, and therefore virtually said to them: "You are more competent to decide this matter, which concerns you so nearly, than we are. We therefore authorize you to enforce the general laws of the State on this subject and suppress these houses, or to regulate them, as you may think best."

The meaning of the word "regulate" has been discussed in this case; but it is a word which from its Latin origin needs no explanation. It certainly implies the continued existence of the subject-matter to be regulated.

"To regulate commerce," are words found in our Federal constitution, and which have received a judicial interpretation, and they certainly conceded that the commerce, concerning which congress was allowed to make regulations, was to be allowed under some rules. It did not mean to annihilate, or suppress, or to prohibit under all and every circumstances. No regulations or rules are necessary concerning an evil absolutely prohibited.

The only difficulty in the case arises from the fact that, whilst the legislature of the State have clearly and specifically intrusted to the municipal legislature of St. Louis a power to regulate this subject, as they thought most expedient, they have in the same enactment declared that such legislation must be consistent with the general laws of the State. It is perfectly plain that this general declaration and the specific grant of power are totally irreconcilable. For the State law had never allowed regulations of any kind concerning bawdy-houses, but had absolutely prohibited them, and made them nuisances and obnoxious to prosecution by the law officers of the State.

The question then arises whether this general prohibition, or this special permissive existence under regulation, must prevail, and we are clear that a particular specified intent on the part of the legislature overrules the general intent incompatible with the specific one.

Many authorities might be cited on this general proposition, but the case of the *State v. Binder*, 38 Mo. 451, is directly in point in this case.

In that case the legislature authorized the city of St. Louis to allow certain beer saloons to be kept open on Sunday, though it was expressly prohibited everywhere else, and the court regarded this as a special exemption from the general law, and, so far as the city was concerned, necessarily a repeal of the general law.

There is no doubt that the city authorities of St. Louis have no power except such as has been confided to them by the legislature. No authorities are needed to establish this proposition, as this court has repeatedly recognized the doctrine. There is just as little doubt that, looking at the previous legislation concerning this subject in all the charters of the city, and considering the emphatic change made in 1870, and the subsequent action of the city authorities on that change, and the subsequent silence of the State legislature on the subject, there was a deliberate intention on the part of the legislature to leave this subject to the control of the people of St. Louis and their legitimate representatives in the council.

It is said that this ordinance is in subversion of the common law, contrary to the general law of the State, against public policy, and of immoral tendency; and that it contains provisions which infringe on the constitutional rights of citizens.

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The legislature has a right to change the common law; it has a right to allow the legislative authorities of St. Louis to regulate the subject now under consideration differently from what it is in the other portions of the State. It is a naked assumption to say that any matter allowed by the legislature is against public policy. The best indication of public policy is to be found in the enactments of our legislature. To say that such a law is of immoral tendency is disrespectful to the legislature, who no doubt designed to promote morality; and it is altogether unwarranted to suppose that the object of the law or the ordinance is for any purpose but to promote the morals and health of the citizens. Whether the ordinance in question is calculated to promote the object is a question with which the courts have no concern. With the expediency, or propriety, or wisdom, of a legislative enactment we have nothing to do. If a constitutional right is infringed, the courts are open to afford redress. We have no opinion, and therefore express none, about the expediency of this ordinance. Arguments on that point should be addressed to the State or city legislature. It would be a novel exercise of judicial power to pass on the expediency of legislative enactments—a matter outside of the province of courts of justice. The only question we have to decide is, whether the power existed to make the law, and we think that the legislature granted this power.

If there are provisions in this ordinance, chap. 14, which infringe on the rights of citizens, male or female, protected by the constitution and laws of the State, and such provisions are attempted to be enforced, the remedy is obvious. But even according to the case referred to in 1 Gray (*Fisher v. McGier*, 1 Gray, 1), it is not pretended that unconstitutional provisions in a law make it totally void. On the contrary, it is well settled that they do not, and that a law may well stand, so far as it is constitutional, although it has in it certain provisions which are not valid. And in this case the only question was, whether the defendant's license under the ordinance was a protection. No question concerning the medical examination, provided for in certain sections of the ordinance, arose.

No complaint on this subject was made by any one affected by the provisions said to be oppressive and in opposition to our bill of rights.

It was, in fact, conceded that various provisions of the ordinance

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were entirely unexceptional so far as the State constitution was concerned, and it was only insisted that the general intent and scope of the ordinance was to promote immorality. Of this we are not authorized to judge. The legislative authorities of St. Louis are more competent and better qualified to decide this question than this or any other court. We doubt not that their intention was to promote the public morals. Whether the ordinance in question was the best mode of doing this was a matter they were authorized to decide. This court has no power to revise their decision on this question — it was a legislative, not a judicial question.

Judges ADAMS and WAGNER concur.

VORIES, J., delivered a dissenting opinion, in which SHERWOOD, J. concurred.

*Judgment reversed.*

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**CANTLING V. THE HANNIBAL AND ST. JOSEPH RAILROAD COMPANY.**

(54 Mo. 385.)

*Common carrier — railroad company — liability as carrier of animals. Evidence — opinion of experts as to value of dog.*

Plaintiff, not being permitted to take his dog with him in defendant's passenger car, delivered it to the baggage-master of the train and paid him for its transportation. By the defendant's regulations, which were posted at various stations, "live animals" were "allowed as baggagemen's perquisites," but plaintiff had no special notice of this regulation. The dog was lost through the baggageman's negligence. *Held*, that defendant was liable for the value of the dog.

Experts may be allowed to give their opinions as to the value of dogs, the opinions being based either on actual sales or their general observations and experience.

**ACTION** to recover the value of a dog. The opinion states the case.

*James Carr*, for appellant.

*Williams & Ederman*, for respondent.

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NAPTON, J. This action originated before a justice of the peace, to recover the value of a dog, alleged to be worth \$90. It is averred that the dog was delivered to the baggage-master of a train on which the plaintiff was a passenger; and that the baggage-master agreed to transport the dog to New Cambria for \$1.50, which was paid, and to deliver him at New Cambria to said plaintiff. The dog was lost, and the plaintiff therefore sued the railroad company, defendant.

The plaintiff recovered before the justice, had a verdict and judgment for \$90, from which defendant appealed to the Circuit Court.

The facts as they appeared on the trial were about these: The plaintiff, on his return from a hunting excursion, took passage on the defendant's road at St. Joseph and took the dog with him into the coach. About an hour after the train started, he was told by a brakeman that dogs were not allowed to ride in the passenger coaches, and that the dog must be put in the baggage car, and subsequently the plaintiff received the same information from the baggage-master; whereupon the baggage-master took the dog in the baggage car, and the plaintiff, after inquiring about the charge, paid the baggage-master \$1.50 for the transportation of the dog to New Cambria.

The principal witness for plaintiff proposed to state the value of the dog, but this was objected to on the grounds that dogs had no marketable price, and that the dog in question was not shown to possess any peculiar qualities which would make him vendible; but this objection was overruled, and the witness said the dog was worth \$100, after previously stating that the dog was a well-trained setter, and particularly valuable as a water dog. The same witness was asked what he gave for the dog, and this question was objected to as immaterial and the objection sustained.

Several witnesses were examined as to the value of hunting dogs, and testified about their price varying from \$50 to \$75, admitting, however, that this depended very much on the fancy of the purchaser.

It seems that certain rules on the subject of baggage had been, at the time of this occurrence, adopted by defendant and posted up in printed form at the various railroad stations. The only important part of these regulations is the following: "Live animals are allowed as baggagemen's perquisites." The general baggage-agent of defendant stated in his deposition that "it is the custom of rail-

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road companies to allow baggagemen to receive and transport dogs on their own personal account and personal responsibility to their owners. None of the companies receive any part of the compensation or assume any of the responsibility for the care or delivery of such dogs."

There was no evidence that the plaintiff knew of any such regulations, except from their being posted up as above stated.

The dog in question was not injured or lost, in the course of transportation, but the baggage-master delivered the dog to some person, not the plaintiff, and at some way station, not New Cambria, and so the plaintiff lost him.

The court declared the law to be, that a dog is not baggage, and that defendant, as a common carrier, was not bound to receive and carry a dog in a passenger coach or in a baggage car attached thereto, although the owner was a passenger, and that the measure of damage, in the event of a finding for the plaintiff, was the actual market value of the dog in the vicinity of New Cambria, and not any fanciful price of the owner.

The court also refused two instructions which are as follows: 1st. The defendant may make a rule permitting its baggage-master to take a dog owned by a passenger upon one of its passenger trains into the baggage car of said train, for the accommodation of such passengers, and to receive the perquisites for feeding and watering and taking care of such dog for such passenger, and, in the event that such dog should never be delivered to such passenger by said baggage-master, the defendant would not be liable to him for failing to deliver such dog. 2d. If the court believe from the evidence that the plaintiff, without the knowledge or consent of the agents or employees conducting and managing the train on which plaintiff took passage, took the dog sued for into one of defendant's passenger coaches at St. Joseph with the intent to have said dog carried from St. Joseph to New Cambria; that, after said train left St. Joseph an hour or more, he was informed by employees of defendant on said train that said dog could not be allowed to be carried on said coach; that he thereupon put said dog into the baggage car attached to said train, in charge of the baggage-master thereof, and said dog was never delivered to plaintiff by said baggage-master, the court will find for defendant, although it may further believe from the evidence that the plaintiff put said dog in charge of the baggage-master of said train at the instance of said



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baggage-master, and paid said baggage-master for feeding, watering and taking care of said dog for him.

The case was submitted to the court, and the court found for the plaintiff, and assessed his damages at \$30.

The main question is whether the plaintiff was entitled to recover of the railroad company for the value of a dog lost by the baggage-master, to whom the dog was intrusted, and who was authorized by the regulations to take the dog in the baggage car as "perquisite," there being no special notice to the owner, except such as may be implied from such regulations being printed and posted in the station offices. It is conceded that the baggage-master had a right, under the regulations of the company, to receive a dog of a passenger and charge a small sum for his trouble; but it is claimed that by the printed regulations, as well as by the custom of this and other railroad companies, no responsibility is assumed by the companies; that all losses, whether accidental or willful or negligent, must be borne by the traveler, whose only remedy is a suit against the baggage-master. In other words, the traveler must bear the loss, if any occurs, for it would be folly to talk of a suit against a baggage-master.

In the case of *Minter v. Pac. R. R.*, 41 Mo. 503, this court held that an agent of a railroad company, in that case a baggage-master, acting within the general scope of his employment, bound the company, notwithstanding in the particular case he disregarded instructions. That was a case where an article of freight was received by the baggage-master as baggage, contrary to the rules of the company. In this case the baggage-master acted in conformity to his instructions, and received the dog in his baggage room and took his perquisites, as the company allowed him to do. But the company insist that they are not responsible, because, although allowing their servant to receive and charge for such property, they notified the public that no responsibility on their part was assumed, and that it was an affair of the baggage-master, their employee.

There is no question of negligence or diligence in this case, for the fact is proved and not disputed that the baggage-master delivered the dog to some one, other than the traveler, at a station to which the traveler was not bound. It is not, therefore, a question, whether the railroad company was bound as a common carrier against all losses except those arising from the acts of God or the enemies of the country, nor whether the company was bound to ordinary dili-

genoe, but whether the company is bound at all and under any circumstances. We think, as the company undertook through its agent to transport the dog, and deliver him at a place designated and to the plaintiff, they should be held responsible for a delivery at a different place and to another person.

It may be questioned if the printed notice that "live animals are baggage-men's perquisites" necessarily leads to the conclusion that no responsibility whatever is assumed in such cases by the company. It certainly implies that the company allow these baggage-masters to take "live animals" in the baggage room, and that the charge for doing so is a perquisite of the baggage-master and does not go into the coffers of the company, but it does not necessarily imply that no responsibility whatever was assumed by the company. And if it did, can the company, by such printed notices, exempt themselves from a responsibility for ordinary care and diligence in the transportation and delivery of the article? In other words, can the company take charge of the property and promise to deliver it and assume no liability whatever?

Judicial opinions, both in England and this country, are not altogether harmonious as to the limitations which common carriers may make, by special contracts or general notices, on their common law liabilities; but I do not understand that any of the cases have gone so far as to determine that railroad companies can exempt themselves from that responsibility which every bailee assumes for ordinary care and common honesty. If their employees are allowed to receive goods or live animals at all for transportation, the public have a right to infer that without an accident they will be delivered to the person and at the place directed, and that ordinary care and diligence will be used for this end. It is a mere mockery to turn the owner over to a subordinate, about whose responsibility no one can know except the company that employs him.

The instructions, therefore, which assume the irresponsibility of the defendant, without regard to the execution of the implied contract by the baggage-master, under any circumstances, were properly refused.

The evidence concerning the value of the dog in question by the owner, and the opinion of other witnesses on the value of dogs generally, having the qualities attributed to this particular dog, was rightly admitted. Such is the usual mode of ascertaining the price of cattle or sheep or any other marketable commodity, and

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as necessarily more or less a matter of opinion among the dealers in such stock or property. Of course, actual sales may be more reliable evidence of the market price, but experts may be allowed to give their opinions based either on actual sales at the time and place, or on their general observation and experience, and was so held by Judge NELSON in the case of *Brill v. Flagler*, 23 Wend. 355, and by the Court of Appeals in *Clark v. Baird*, 9 N. Y. 183.

The other judges concur.

*Judgment affirmed.*

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STATE v. GERMAN, plaintiff in error.

(41 Mo. 226.)

*Criminal law — corpus delicti — confession without proof of.*

A conviction of murder is not warranted when there is no proof of the *corpus delicti*, but the uncorroborated extra judicial confession of the accused.

Defendant was indicted for the murder of C. who had disappeared some months before. No remains of C. were found, nor was there evidence of his death, other than a confession by the defendant that he killed C., alleged to have been made to the officer who arrested him. At the trial defendant pleaded not guilty. *Held*, that evidence of the confession was not admissible. See *note*, p. 486.

INDICTMENT for murder. The opinion states the case.

*James F. Hardin* and *D. A. Harrison*, for plaintiff in error.

I. The court erred in admitting any evidence. There was no proof offered tending to prove that Canaday was dead, and without proof of the death, there could be no conviction. *Whart. Am. Crim. Law*, §§ 745, 746; *State v. Robinson*, 12 Mo. 592; *State v. Scott*, 39 id. 429; 1 *Chit. Crim. Law*, 563; 3 id. 736; 1 *Russ. Crimes*, 567, 568; 1 *Greenl. Ev.*, § 217. The confessions could not be used to prove the *corpus delicti*. See above cases. II. The court erred in admitting the evidence of confessions testified to by the witness, C. W. Mallory. 1 *Greenl. Ev.*, §§ 213, 263; *People v. Ward*, 15 *Wend.* 231; *State v. Hector*, 2 Mo. 163;

1 Phil. Ev. 544, and cases there cited; Archibald's Crim. Pl. 125, 126; Roscoe's Crim. Ev. 34; Joy on Confessions, 38 Law Lib. 59-61; 7 Iredell (N. C.), 239; 2 Humph. (Tenn.) 37; *State v. Scott*, 39 Mo. 424; *State v. Robinson*, 12 id. 592; *State v. Brockman*, 46 id. 566.

*H. Clay Ewing, attorney-general, for defendant in error.*

WAGNER, J. The defendant was indicted in the Circuit Court for murder in the first degree, in killing one Canaday. On the first trial he was convicted of the offense with which he stood charged, but on his motion that conviction was set aside, and being again put upon his trial he was found guilty of murder in the second degree.

The testimony, as preserved in the bill of exceptions, shows in brief, that the defendant and Canaday lived together, Canaday having married defendant's wife's mother; that on the day on which Canaday disappeared, the two started together in a wagon, to a cornfield where they were working, about two miles distant. In the evening, when defendant returned, he was alone, and when inquired of concerning Canaday, he said that a couple of men came along where they were at work, and gave the old man a drink of whisky, and he went off with them. There was nothing unusual about defendant's actions and appearance, and he uniformly told the same story in reference to Canaday's absence.

After the lapse of several months in the woods between the house where defendant lived and the field where he went to work when he was accompanied by Canaday, a pair of old boots and some other clothing were found, and also some bones. An attempt was made to identify the boots and clothing as those belonging to and worn by Canaday, but the evidence only showed that they were similar, no witness swearing to a positive identification. Nothing was done toward arresting the defendant or fastening the alleged crime upon him, and in about eight months after Canaday's disappearance he changed his residence, going into Kansas, forty miles distant from where he previously resided. A warrant was afterward sued out against him, in Jasper county, charging him with the murder of Canaday, and an officer went and arrested him, in his own house. He accompanied the officer back to Jasper county, without any kind of resistance, and on the way he was told by one of them that it would be better for him to confess.

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After he was placed in prison, the officer who arrested him and was deputy sheriff had several conversations with him. The officer says that those conversations were confidential; and upon another occasion he says that he had the prisoner completely "broke." At one of these conversations, and one only, the prisoner made the confession to him, which was given in evidence. From the officer's statement it seems that the prisoner labored under the impression that there were certain witnesses who were going to swear that he committed the crime. He evidently believed that they would convict him, and he told the officer that he had made up his mind not to put the county to any more expense, and that he would plead guilty, and that he killed Canaday. There was a mere admission of killing; no time, place, or circumstances were given. He wanted the officer to see the judge and use his influence to have his punishment as light as possible, and then to get up a petition to have him pardoned. The officer promised that he would get up the desired petition, and told him that he thought he could be got out of the penitentiary, after he had been there a reasonable time. At the time this confidential interview was had, it appears that this same officer was engaged with others in procuring counsel to assist in prosecuting the accused to a conviction, for the purpose of obtaining a reward that had been offered. It appears abundantly clear that, when the prisoner proposed to plead guilty and confess the crime, he supposed that he could plead guilty of murder in the second degree, and that no higher punishment than imprisonment in the penitentiary could be inflicted upon him under the indictment. But when he afterward saw the indictment and became aware that it was for murder in the first degree, and that a conviction thereon might lead to an execution, he changed his mind, and declared that he would not plead guilty, but would stand his trial. Such is substantially the evidence as shown by the record. It will be observed that there was no evidence whatever that Canaday was murdered except the confession of defendant, and that was made under circumstances which rendered it inconclusive and questionable indeed whether it should have been admitted at all.

Confessions are divided into two classes, namely, judicial and extra-judicial. Judicial confessions are those which are made before the magistrate or in court, in due course of legal proceedings, and it is essential that they be made of the free will of the party, and with full and perfect knowledge of the nature and consequences of the

confession. Of this kind are the preliminary examinations, taken in writing by the magistrate, pursuant to statutes, and the plea of guilty made in open court to an indictment. Either of these is sufficient to found a conviction upon, even if it be followed by sentence of death, they being deliberately made, with the advice of counsel, and under the protecting caution and oversight of the judge. Extra-judicial confessions are those which are made by the party elsewhere than before a magistrate, or in court, this term embracing not only explicit and express confessions of crime, but all those admissions of the accused from which guilt may be implied. 1 Greenl. Ev., § 316.

Whether extra-judicial confessions, uncorroborated by any other proof of the *corpus delicti*, are of themselves sufficient to found a conviction of the prisoner upon, has not only been doubted, but, in the best considered cases, denied. "In the United States," says Greenleaf, "the prisoner's confession, when the *corpus delicti* is not otherwise proved, has been held insufficient for his conviction; and this opinion certainly best accords with the humanity of the criminal code, and with the great degree of caution applied, in receiving and weighing the evidence of confessions in other cases; and it seems countenanced by approved writers on this branch of the law." Id., § 217. Wharton, in his treatise on criminal law, lays down the doctrine in equally emphatic terms, and says that proof of the *corpus delicti*, by clear and satisfactory evidence, must always precede a conviction. He approvingly quotes the language of Lord HALE, where that great judge says: "I would never convict any person for stealing the goods of a person unknown, merely because he would not give an account how he came by them, unless there were due proof made that a felony had been committed. I would never convict any person of murder or manslaughter unless the fact were proved to be done, or at least the body found dead." 1 Whart. Crim. Law, §§ 745, 746. A writer of standard excellence has said: It may be doubted whether justice and policy ever sanction a conviction where there is no other proof of the *corpus delicti* than the uncorroborated confession of the party. Wills on Cir. Ev., § 6. In murder trials the rule laid down by Lord HALE has been generally followed, namely, that the fact of death should be shown, either by witnesses who were present when the murderous act was done, or by proof of the body having been seen dead; or if found in a state of decomposition, or reduced to a skeleton, that

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it be identified by tests of the most clear and cogent character. These authorities have frequently received the approbation of this court. In *Robinson v. The State*, 12 Mo. 592, Judge RYLAND, after examining many of the cases, laid it down as the settled rule, that the confession of a defendant, not made in open court, or on an examination before a committing court, but to an individual, uncorroborated by circumstances, and without proof *aliunde* that a crime has been committed, would not justify conviction. In the case of *The State v. Scott*, 39 Mo. 424, which was an indictment for robbery, where the evidence showed that the prisoner was riding in company with an old man, and he declared that he intended to get into a "fuss" with the old man and take his horse from him, and afterward he was seen riding the horse, and he said that he had got into a "fuss" with the old man and took his horse, this was held to be insufficient evidence to warrant a conviction, because there was no corroborative testimony that a crime had been committed. This doctrine was also recognized in the case of *The State v. Lamb*, 28 Mo. 218, where a conviction for murder was sustained upon a judicial confession by the prisoner, which constituted the only actual proof of the commission of the crime. But there was a chain of corroborative circumstances, from which the evidence of guilt was irresistible. In the case at bar there is an utter failure to prove the *corpus delicti*.

All the circumstances proved by the State, outside of the confession, may well exist, and still be entirely consistent with the fact that Canaday was never murdered, and that he is still alive; that a pair of coarse boots were found similar to his is really no evidence. All boots bought of the store as his were will look alike when worn; so with the clothes. The belt, which it was first thought was his, upon a close examination, proved not to be his. Mrs. Davis, the witness with whom he had lived when he was working on the railroad, and who had mended it for him, when she inspected it, said that his belt was lined by her with a piece from an old calico dress, and that the belt produced and found was lined with bed ticking and was not his. The confession was made out of court, and lacks the necessary corroboration.

It further appears that it was made under a misapprehension, and that the prisoner did not have a full knowledge of all the facts and of the consequences that would result therefrom. It is undeniable that the officer to whom the confession was made was in the

prisoner's confidence, and exerted a great influence over him, and it may be well doubted whether it was properly admitted in evidence.

I think that the demurrer tendered to the evidence by the defendant's counsel should have been sustained, and that the judgment should be reversed, and the cause remanded.

The other judges concur.

*Judgment reversed.*

**NOTE.**—See the remarkable case of the *Boorn Brothers* cited in note to 1 Greenleaf on Evidence, § 214. A report of this trial has been recently published by the Hon. Leonard Sargeant, one of the counsel at the trial. The Boorns were indicted for the murder of Russell Colvin, made a circumstantial confession of the murder—the one an oral and the other a written confession—were convicted upon the confessions and sentenced to be hanged. Before the day of execution Russell Colvin returned, and the Boorns were discharged. Instances of erroneous convictions upon confessions may be found in *Harrison's Case*, 1 Leach's C. C. 364-372; *Mary Smith's Case*, 2 How. St. Tr. 1049; *Essex Witches*, 4 id. 817; *Suffolk Witches*, 6 id. 647; *Devon Witches*, 8 id. 1017. See also Wills on Circumstantial Evidence, 88; Joy on Confession, 100. For a number of cases of erroneous conviction, see Ram on Facts (3d Am. ed.) 439.

LORD HALE said: "I would never convict any person of murder or manslaughter unless the fact were proved to be done, or at least the body found dead, for the sake of two cases," which he proceeds to relate. 2 Hale's P. C. 290. Blackstone speaks of this rule of Hale's as "most prudent and necessary to be observed," 4 Com. 358. In the case of *Vidotto*, 1 Park. Cr. 609, WALWORTH, Circuit J., said: "One rule which ought never to be departed from is that no one should be convicted of murder upon circumstantial evidence unless the body of the person supposed to have been murdered has been found or there be clear and irresistible proof that such person is actually dead." In *Twissell's Case*, Wills on Cir. Ev. 181, Baron PARKES told the jury that "the only fact which the law requires to be proved by direct and positive evidence is the death of the party by finding the body, or, when such proof is absolutely impossible, by circumstantial evidence leading closely to that result—as where a body was thrown overboard far from land, when it is quite enough to prove that fact without producing the body."

In *Ruloff v. The People*, 18 N. Y. 179, the Court of Appeals held that to warrant a conviction of murder there must be direct proof either of the death, as by the finding and identification of the corpse, or of criminal violence adequate to produce death, and exerted in such a manner as to account for the disappearance of the body. The opinion of the court was delivered by JOHNSON, Ch. J., and is a very able and thorough examination of the cases and principles bearing on the subject. See, also, *People v. Bennett*, 49 N. Y. 127; *Smith v. Commonwealth*, 21 Gratt. 809; *State v. Keeler*, 26 Iowa, 553; *State v. Davidson*, 20 Vt. 377. For an elaborate discussion of this subject and a collection of the authorities see Wharton on Homicide (2d ed.), § 628; Wharton on Criminal Law (7th ed.), § 746; Bishop on Crim. Pro., §§ 1070, 1071.—*RAP.*



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Hull v. City of Kansas.

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**HULL v. CITY OF KANSAS, appellant.**

(64 Mo. 555.)

*Municipal corporation — defect in street — injury therefrom — contributory cause.*

A horse was injured while the driver was in the exercise of ordinary care and prudence — the injury being attributable to the insufficiency of defendant's street, conspiring with an accidental cause. *Held*, that defendant was liable in damages.

**ACTION** to recover damages. The opinion states the case.

*Brumbach*, for appellant.

*Tichnor & Warner*, for respondent.

**NAPTON, J.** This action was to recover damages for an injury to a horse and buggy, alleged to have been occasioned by a hole in a street, negligently left uncovered by the city authorities.

The facts appeared to be, that the driver of the buggy, when attempting to turn from one street into another, got one of the lines entangled under the horse's tail, which caused the horse to commence backing, and as the driver was about to jump out, the horse fell into this hole in the embankment on which the street was built.

The court, on the trial, declared the law to be "that it was the duty of the defendant to keep its streets in a proper state of repair, so that they should be reasonably safe for travel, and if the defendant permitted one of its streets to be and remain out of repair, and at the time said street was so out of repair, the plaintiff's horse and buggy were being driven along the same, and without the fault of the driver, the horse and buggy of plaintiff were injured by reason of said street being out of repair, then the plaintiff is entitled to recover, even though such injury was the combined result of accident and of the defendant's neglect to keep said street in repair; provided the driver of said horse was in no fault."

The court refused to declare the law as asked by defendant, that, if the defect in the street was not the sole cause of the injury, no

recovery could be had; and therefore, if, before the accident, the driver of the horse had lost all control over him, and the horse continued uncontrollable at the time of the accident, the plaintiff could not recover.

Another instruction was asked — that if this occurred on Sunday, and the plaintiff who was the owner of the horse and buggy had hired them out on that day from his livery stable, no recovery could be had.

There was a verdict and judgment for plaintiff. The point presented by the instructions in this case, I understand, was decided at the last term at St. Joseph, in the case of *Bassett v. The City of St. Joseph*, 53 Mo. 290, in which case this court adopted the view taken by the New Hampshire court in *Winship v. Enfield*, 42 N. H. 202, and declined to follow the decisions in Massachusetts, referred to in the brief of defendant's counsel.

The Circuit Court of Jackson county evidently adopted the views of the New Hampshire cases, and determined, that although the injury was the result of accident, in the temporary loss of control over the horse, yet, if that accident would have resulted in no damage, had the street been in a proper repair, the city must be held responsible.

Indeed, it is not very clear that the Massachusetts cases go to the extent of holding that a mere temporary loss of control over the horse driven along the street would relieve the city from responsibility. It is held, that where the horse escapes from the driver entirely, or is totally ungovernable, or is a vicious animal, the damage occasioned is not chargeable to the city or town, because it ultimately occurs in a street or at a place where the street is out of repair.

In this case the driver had not lost control of the horse, except during the short period of his backing into the hole, and if no such hole had been there, no damage would have occurred. In the case of *Hunt v. Pownall*, 9 Verm. 411, REDFIELD, J., said: "In every case of damage occurring on a highway, we could suppose a state of circumstances in which the injury would not have occurred. If the team had not been too young, or restive, or too old, or too headstrong, or the harness had not been defective, or the carriage insufficient, no loss would have intervened. It is to guard against these constantly occurring accidents that towns are required to guard in building highways. The traveler is not bound to see to

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Hull v. City of Kansas.

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it that his carriage and harness are always perfect, and his team of the most manageable character and in the most perfect training, before he ventures upon the highway. If he could be always sure of all this, he would not require any further guaranty of his safety unless the roads were absolutely impassable. If the plaintiff is in the exercise of ordinary care and prudence and the injury is attributable to the insufficiency of the road, conspiring with some accidental cause, the defendants are liable."

This is in substance the position of the Circuit Court in its instructions in the case.

*Judgment affirmed.*

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**IOWA**

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**DANIELS V. THE CHICAGO AND NORTHWESTERN RAILROAD  
COMPANY, appellant.**

(55 Iowa, 120).

*Ejectment — against railroad company wrongfully in possession of lands.*

A railroad company took land belonging to a private person without tendering compensation. *Held*, that the owner was not confined to the statutory remedy for the assessment of damages, but could maintain ejectment against the company.

**ACTION** of right for the possession of lands. The defendant admitted plaintiff's ownership of the *locus in quo*, but alleged among other things that the plaintiff's only remedy was under the statute for the assessment of damages. Verdict and judgment for plaintiff.

*N. M. Hubbard and Thomas Corbett, for appellant.*

*R. Latham, for appellee.*

**DAY, J.** [After deciding some questions of no general interest]. The principal question in the case arises upon the right of the

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*Daniels v. The Chicago and Northwestern Railroad Co.*

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plaintiff to maintain this action. The State constitution, article 1, section 18, provides: "Private property shall not be taken for public use without just compensation first being made, or secured to be made, to the owner thereof as soon as the damages shall be assessed by a jury \* \* \*."

Section 1317 of the Revision of 1860 contains the following provisions: "If the owner of any real estate, over which said railroad corporation may desire to locate their road, shall refuse to grant the right of way through his or her premises, the sheriff of the county in which said real estate may be situated shall, upon the application of either party, appoint six disinterested freeholders of said county not interested in a like question, unless a smaller number is agreed upon by the parties, whose duty it shall be to inspect said real estate and assess the damages which said owner will sustain by the appropriation of his land for the use of said railroad corporation, and make report, in writing, to the sheriff of said county, who shall file and preserve the same; and if said corporation shall, at any time before they enter upon said real estate for the purpose of constructing said road, pay to said sheriff, for the use of said owner, the sum so assessed and returned to him as aforesaid, they shall be thereby authorized to construct and maintain their railroad over and across said premises \* \* \*." Appellant claims that plaintiff must resort to this statute, and have his damages assessed. Upon this branch of the case the court gave the following instruction: "As to the third defense, that is, that this action will not lie, but that plaintiff should have proceeded under the statute, you are instructed that the plaintiff was not bound to resort to the statute remedy, and his failure to do so is no defense."

It has been quite uniformly held, and may now be regarded as a settled doctrine in this country, under statutes such as ours, that the statutes furnish the only mode of ascertaining the damages consequent upon the taking of private property for public use. Redfield, in his work upon railways, vol. 1, page 344, uses this language: "It seems to be well settled, notwithstanding some exceptional cases, that the remedy given by statute to land owners, for injuries sustained by taking land for railways, is exclusive of all other remedies, and not merely cumulative." See, also, cases cited in note 1.

And upon page 337 of the same work it is said: "The general principle that the statute remedy, as far as it extends, is exclusive,

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seems to be universally adhered to in the American courts, with slight modifications, some of which are, and some are not, perhaps, entirely consistent with the maintenance of the general rule." And in *Pierce on Amer. R. R. Law*, page 230, it is said: "If both parties have the power to carry the statute remedy into effect, and there is no prior obligation on the company to resort to it, the injured party cannot avail himself of an action at common law, and is confined to that remedy. But if the company, alone, can put it into operation, or is under a special obligation to carry it into effect, and has not done so, the injured party is not deprived of his remedy by action." See, also, cases cited in note 3, and the following cases cited in appellant's brief: *Kemble v. Canal Company*, 1 Carter (Ind.), 285; *Calving v. Baldwin*, 4 Wend. 667; *Stowell v. Flagg*, 11 Mass. 363; *Mason v. Kennebec and Portland Railway Co.*, 31 Me. 215; *Aldrich v. Cheshire Railway Co.*, 1 Amer. Railway Cases, 206; *The Town of Lebanon v. Mills County*, 1 N. H. 339. Under this array of authorities, we would not hesitate to hold that where a land owner seeks to recover the damages sustained by the taking of his property for right of way, he cannot at once have recourse to the courts of law, but he must cause his damages to be assessed in the mode prescribed by the statute.

And yet there is, to our minds, a well-defined and reasonable distinction between an action which has for its object the recovery of damages for property taken, and which, when recovered, establishes in the defendant the right to continue the possession, and one which denies the right of possession, and seeks to recover it. Upon principle it would seem that the right to maintain an action of ejectment must exist, if the defendant's possession is wrongful. Upon page 335 of *Redfield on the Law of Railways* it is said: "If the railway company have assumed to appropriate the land, in violation of the provisions of the statute to be complied with on their part, their acts are ordinarily to be regarded as trespasses." See cases cited in note 2. And on page 364 it is said: "It has been considered that if the company enter upon lands without complying with the requisitions of the statute, they are liable in trespass or ejectment, citing *Doe d. Hutchinson v. The Manchester, Bury and Rosendale Railway*, 14 M. & W. 687. See, also, *Stacy v. Vermont Central R. R.*, 27 Vt. 39. In a note upon page 284 of *Redfield on Railways* it is said: "In most of the States the assessment of the damages due to the land owner, and the payment,

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**Daniels v. The Chicago and Northwestern Railroad Co.**

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tender, or deposit of the same, is held a condition precedent to the right of entry upon the land, and the company entering before this will, *prima facie*, be regarded as trespassers." Citing *Memphis and Charleston Railway Co. v. Payne*, 37 Miss. 700; *Henry v. Dubuque and Pacific Railway*, 10 Iowa, 540.

The constitution provides that private property shall not be taken for public use without just compensation first being made or secured to be made. And section 1317 of the Revision authorizes the railway company to construct and maintain their road, if they shall, at any time before they enter for that purpose, pay to the sheriff, for the use of the owner, the sum assessed. It is impossible to conceive of any just legal principle, under which a railway company can acquire any rights in the lands of another, without complying with these requirements of the constitution and of the statute, unless the owner in some way waives his right to insist upon such compliance. The case of *Henry v. The Dubuque and Pacific Railway Co.*, 10 Iowa, 540, citing *Bloodgood v. M. and H. Railway Co.*, 18 Wend. 1, is a case strongly in point.

Our view is, that while a land owner cannot, in any other mode than that prescribed in the statute, cause damages to be assessed for the taking of his property for right of way, he may, nevertheless, maintain an action of ejectment if his property is taken by the company without tendering compensation.

See *Ford v. Chicago & North Western Railway Co.*, 14 Wis. 609, in which it was held that an injunction will lie to restrain a railroad from occupying a street without ascertaining and paying the damages.

The case also recognizes a distinction between past damages, or those occasioned by a trespass, and permanent damages consequent upon the continued use of the property, holding that the former may be assessed by the court, but that the latter can be determined only in the manner prescribed by the statute.

*Judgment affirmed.*

## MICKEY V. THE BURLINGTON INSURANCE COMPANY.

(35 Iowa, 174.)

*Fire insurance — covenant for care of property — negligence of insured.*

An applicant for a policy of fire insurance covenanted to keep his stoves and pipes well secured. After the policy was issued the wife of the assured, intending to remove for the summer a stove, the pipe of which passed through the floor of an upper room and thence into the chimney, took down the pipe in the upper room and placed a bed over the hole in the floor, but did not remove the stove and pipe below. Afterward forgetting what she had done, she built a fire in the stove which set fire to the bed and burned the house. *Held*, that the assured could recover on the policy.

Mere negligence on the part of the assured or his servants resulting in the destruction of the insured property will not defeat the policy; to have that effect the negligence must be gross and inexcusable.

ACTION upon a policy of insurance against loss by fire upon the dwelling-house and household furniture of plaintiff. By stipulations in the policy the application of plaintiff for insurance and the survey of the premises are made parts of the instrument with a warranty on the part of the insured. A condition of the contract requires the assured, in case of loss, to give "forthwith" notice thereof, and to render, as soon after as possible, a particular account of such loss, signed and sworn to by the assured, stating the existence of other insurance, if any, the actual cash value of the property, etc.; and also to produce a certificate of a magistrate, notary public or commissioner of deeds, that he has examined the circumstances attending the loss, etc., and believes the assured has without fraud sustained loss in an amount to be named. Another condition provides that no suit shall be sustained unless it be brought within six months after the occurrence of the loss, and that, in case an action should be brought after that time, "it shall be taken and deemed as conclusive evidence against the validity of such claim, any statute of limitation to the contrary notwithstanding."

The application of the plaintiff for insurance contained the following interrogatory and answer: "Are your chimneys, fire-places, fire-boards, stoves and pipes all well secured, and will you engage to keep them so?" Answer, "Yes."

A verdict was rendered for the plaintiff and from the judgment entered thereon defendant appealed.



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Mickey v. The Burlington Insurance Co.

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*Newman & Blaks*, for appellant.*Halls & Baldwin*, for appellee.

BROCK, Ch. J. The facts in regard to the cause and origin of the fire which destroyed the property insured are not contested. They are as follows: The pipe of a stove used in the house passed through the floor of an upper chamber, thence with an elbow into a flue built in the wall. This stove, not being required for use in the summer months, was usually removed. With the intention of removing it, the wife of plaintiff took down the pipe in the second story chamber, and placed a bed over the hole in the floor through which the pipe passed, but she neglected to remove the stove. A few days after, a visitor complaining of the cold, the wife caused a fire to be built in the stove. This she did forgetting that the pipe had been removed. The result was fire communicated to the bed, and the house was consumed. This occurred in the month of July. There is no evidence that the act of the wife causing a fire to be built in the stove was with the intention of destroying the house, but was simply done through negligence and forgetfulness.

First. It is claimed that the removal of the stove pipe was a breach of the covenant of the application (which by its terms became a condition of the policy) to keep the stoves and pipes well secured, and that the policy is thereby defeated and recovery cannot be had thereon.

The covenant bound plaintiff to keep the pipe "well secured." He was obliged thereby to keep it in such condition, and to exercise toward it such care as a man of ordinary prudence would exercise for the protection of his property. The defendant was protected by this covenant from the effects of defective pipes and stoves. It did not bind plaintiff to keep them always up and constantly in use. He could, if his comfort and convenience so required, remove them and dispense with their use. This would not increase the hazard of the risk, and it was therefore not in violation of the conditions of the policy. The contract was entered into with the implied assent of defendant that plaintiff should possess this right. Therefore, if in its exercise the property was lost, defendant is liable. Does the act of plaintiff come under this rule? The pipe was removed preparatory to removing the stove; the use of both were intended to be dispensed with. The stove was put in a condition not to be used. Its use was just as much intended to be dispensed

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with as though it had been removed to another room or into some out-of-the-way place usually set apart as the receptacle of such things when not in use. Had it been so removed and some one, through negligence and thoughtlessness, should have kindled a fire therein resulting in the destruction of the property, the defendant would have been liable. And this would have been so, as we shall presently see, if the act had been done by plaintiff without fraud or intention to set the house on fire; or without such gross negligence as one with ordinary prudence under no circumstances would fall into. The covenant under consideration does not bind plaintiff to keep the pipe well secured when not in use. If so he could not take it down or remove it even temporarily. But it cannot be denied that if, during a temporary suspension of the use of the stove and pipe for the purpose of repairs and the like, a fire should occur through negligence of the character above indicated in the use of the stove, defendant would be liable for the loss. The case before us is not different in facts and principles. The use of the stove had been dispensed with, the pipe was partly removed and a negligent attempt was made to use it, from which the loss of the property resulted.

These views do not give assent to the doctrine that the covenants and warranties of plaintiff may be disregarded and not literally performed. But we simply maintain that the act of plaintiff in removing the pipe was not covered by the warranty. As all covenants between contracting parties, the undertaking of plaintiff to keep the stoves and pipe secured must be applied to the subject and time within the contemplation of the parties. It will not be extended beyond them to the prejudice of the assured. We cannot so construe it that it will impose restrictions which are unreasonable. *Peterson v. The Miss. Val. Ins. Co.*, 24 Iowa, 494; *Loud v. Citizens' Mut. Ins. Co.*, 2 Gray, 221; *Sayles v. North Western Ins. Co.*, 2 Curt. C. C. 610; *Turley v. North American Ins. Co.*, 25 Wend. 374; *Townsend v. North Western Ins. Co.*, 18 N. Y. 168; *Gloucester Manf. Co. v. Howard Fire Ins. Co.*, 5 Gray, 497; *Troy Fire Ins. Co. v. Carpenter*, 4 Wis. 20; *Gates v. Madison Ins. Co.*, 1 Seld. 469; *Hide v. Bruce*, 3 Dong. 213; *Dobson v. Sotheby*, 1 Moody & Malkin, 90.

We conclude that plaintiff's warranty did not forbid the temporary removal of the pipe at a time the stove was not in use, such restriction not being within the contemplation of the parties.

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Second. We are now brought to inquire as to the liability of defendant for the negligent acts of the insured and his wife. The law upon the subject seems to be well settled. STORY, J., in *The Columbia Ins. Co. v. Lawrence*, 10 Pet. 507, remarks: "In relation to insurance against fire on land the doctrine seems to have prevailed, for a great length of time, that they cover losses occasioned by the mere faults and negligence of the assured and his servants, unaffected by any fraud or design." This doctrine is recognized by the following authorities: *Huckins v. People's Mutual Ins. Co.*, 11 Foster, 238; *St. John v. American Ins. Co.*, 1 Duer, 371; *Hynds et al. v. Schoenectady County Mutual Ins. Co.*, 16 Barb. 119; *Gates v. Madison County Ins. Co.*, 1 Seld. 489; *Catlin v. Springfield Ins. Co.*, 1 Sumn. C. C. 434; *Matthews v. Howard Ins. Co.*, 13 Barb. 234; 1 Philips on Insurance, § 1096, and authorities cited.

It has been held that this rule will not excuse extreme, reckless, and inexcusable negligence on the part of the assured, the consequence of which must have been palpably obvious to him at the time. *Chandler v. Worcester Mutual Fire Ins. Co.*, 3 Cush. 328. But this decision cannot be regarded as in conflict with the current of the authorities. The gross degree of negligence, and its inexcusable character, coupled with the knowledge of its certain effects, ought, it would seem to us, to raise a presumption that the party intended the obvious and necessary consequences of his act, which at the time were apparent to him.

The principles above stated are substantially embodied in instructions given to the jury; others requested by defendant, and presenting different doctrines, were refused by the court. These rulings are approved, and need not be further noticed.

Third. The remaining portions of the opinion dispose of some unimportant questions of evidence and practice.

MILLER, J., dissented from the first paragraph above.

*Judgment affirmed.*

## ESTEP, appellant, v. LACY.

(55 Iowa, 439.)

*Pardon — effect of, on judgment for costs.*

A criminal, sentenced to fine and imprisonment and to the payment of costs, received a general pardon from the governor. *Held*, that he continued liable for the costs.

REPLEVIN for certain property seized by the defendant as sheriff, by virtue of an execution for costs in case of the State of Iowa against plaintiff. Plaintiff alleges that he received a full and complete pardon from the governor, and that this operated as a remission of the judgment for fine and costs. Judgment for defendant. Plaintiff appeals.

*Cloud & Broomhall*, for appellant.

*D. N. Sprague* and *M. E. Outts*, attorney-general, for appellee.

DAY, J. Upon the trial the fact that plaintiff had received a full and unqualified pardon was proved, and it was admitted that defendant was entitled to a judgment, unless plaintiff was discharged from the payment of the costs in question by the pardon of the governor. In our opinion the court below ruled rightly. Although the costs follow the conviction as a necessary incident, yet they constitute a fund distinct from the fine, and are eventually due the witnesses and the various officers of the law.

They are not affected by a general pardon discharging a convict from a fine and judgment of imprisonment. Upon this point see the following: *County of Schuylkill v. Rufensider*, 46 Penn. 446; *State v. McO'Brien*, 31 Mo. 272; *Holliday v. The People*, 5 Gill 214; *State v. Farley*, 8 Blackf. 229; *Ex parte McDonald*, 2 Whart 440.

*Judgment affirmed.*

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Ogg v. The City of Lansing.

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Ogg, appellant, v. THE CITY OF LANSING.

(25 Iowa 465.)

*Municipal corporations — Liability for negligence of agents.*

The health officers of a city requested and directed plaintiff, a passer-by, to assist them in removing a coffin from the house, which he did. The coffin contained the body of a person who had died of the small-pox, which fact was known to the officers but was not communicated to plaintiff. Plaintiff caught the disease and communicated it to his children who died thereof. *Held*, that plaintiff had no cause of action against the city.

**ACTION** for damages. The petition alleges in substance that the defendant is an incorporated city, and that in November, 1871, a man by the name of Lees was sick of the small-pox in said city; that defendant took Lees and the house in which he was confined with said disease under its charge and control, but neglected to take proper and ordinary precautions to prevent the spread of the disease; that said Lees died of said disease during the month of December, and the agent and employees of defendant requested and directed plaintiff, who was passing the house in which Lees died, to assist in taking the coffin in which the corpse of Lees was deposited, from the house, without giving him any notice of the nature of the disease with which Lees died, and without having cleaned the house or used disinfectants or taken any precautions to prevent the spread of the disease; that the plaintiff, having no notice that the small-pox was prevailing in the city, assisted as he was requested, and soon went to his own house and communicated the disease to two of his children, who died thereof in January, 1872. Judgment is asked for \$25,000.

To the petition the defendant filed the following demurrer :

"1st. Defendant is not responsible for the misfeasances, wrongs, or negligence of its officers or agents employed in the public service in enforcing or executing orders or regulations for the prevention of the spread of contagious diseases, or in the care and custody of persons afflicted with such diseases, or in taking charge of houses in which persons afflicted with such diseases are located."

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“2d. The damages alleged are not the direct and necessary result of the wrongful acts complained of, but remote and contingent, which defendant is not responsible for.”

The court sustained this demurrer. **Plaintiff appealed.**

*Edmonds & Healy*, for appellant.

*L. E. Fellows*, for appellee.

DAY, J. Appellant claims that the city is liable for the injuries complained of under the provisions of sections 1057 and 1096 of the Revision, and chapter 107, Laws of 1866.

Section 1096 of the Revision confers upon municipal corporations power to prevent injury or annoyance within their limits from any thing dangerous, offensive or unhealthy; to abate nuisances; to regulate the transportation and keeping of gunpowder; to prevent and punish immoderate riding or driving in the streets; to prevent riots; to suppress and restrain disorderly houses, etc.

Section 1057 of the Revision confers upon the city council power to establish a board of health, to invest it with such powers, and impose upon it such duties as shall be necessary to secure the city and the inhabitants thereof from the evils and calamities of contagious and malignant diseases, etc. The same section confers power to establish a city watch or police; and to prescribe its duties and define its powers in such manner as will most effectually preserve the peace of the city, secure the inhabitants from personal violence, and their property from fire and unlawful depredations; to establish and organize fire companies, and provide them with proper engines, etc. Chapter 107 of the Laws of 1866 constitutes the mayor and council of any incorporated town or city, and the trustees of any township not incorporated, a board of health, and confers upon them certain powers. Section 8 of said act is as follows:

“The board shall have power to make regulations in relation to cleansing the streets, alleys and drains of the city or town, in relation to communication with houses where there is any contagious or infectious disease, to establish pest-houses or hospitals, and when deemed expedient and necessary to prevent the spread of any contagious disease, to remove to said pest-house or hospital any person sick with the Asiatic or malignant cholera, or other malignant or

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infectious disease. To prohibit or prevent all communication or intercourse by and with all houses, tenements and places, and the persons occupying the same in which there shall be any person sick with any contagious, malignant or infectious disease.

“To employ all such persons as shall be necessary to carry into effect the regulations adopted and published according to the powers vested in the board by this act, and to fix their compensation, to employ physicians in case of poverty, and to take such general precautions and actions as it may deem necessary for the public health.”

Appellant concedes that he is unable to cite any case of recovery upon a state of facts similar to those presented in this case. Whilst this is not conclusive against the plaintiff's right of recovery, yet it is an argument against it which is entitled to some consideration. Against the making of a particular precedent it is often a good argument of strong circumstance, and sometimes a sufficient objection that the demand, action or proceeding is a novelty. Ram's Legal Judgment, 275, and cases cited.

Whilst it is not likely that a case in all respects like the one at bar should occur, yet it is probable that cases similar in their substantial features, and involving the same principles, have occurred frequently; and the fact that no case of recovery under like circumstances can be found may well be taken to intimate a general impression of the professional mind against the right to maintain such action. The case being *primae impressionis*, it is proper that we should consider the consequences of the decision which we are about to announce. Upon this subject, Lord ELDON, determining a case in the Court of Chancery, said: “There is one consideration of which this court should never lose sight in every decision which it makes, viz., what is to be the effect of its determination, not in the existing case alone, but upon subsequent similar cases; that a decision founded on misapprehension may not be applied as a principle to cases of the same class which may hereafter arise.” Ram's Legal Judgment, 395, and cases cited.

The consequences of the doctrine contended for by appellant would be startling and alarming. The sections of the law referred to by him authorize a city, in the same language that the powers are conferred, which were exercised in this case, to maintain a police, organize fire companies, and employ a physician for the poor. The principle which would hold the defendant liable

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for the negligent acts here complained of, would compel a city to respond in damages for the neglect of its police to suppress a riot, the failure of its firemen to arrest a conflagration, and the negligence of its physician in prescribing for a patient.

It is impossible to conceive of the endless complications and embarrassments which such a doctrine would involve, and of the extent to which the public interests would thereby suffer. It is safe to assume that if such were recognized as the law, no town would voluntarily assume corporate functions, and that every industrial and commercial interest would become paralyzed.

The true doctrine is that the powers conferred in the sections we have been considering are of a legislative and governmental nature, for a defective execution of which the city cannot be held liable. In discharging these legislative functions the city acts as a *quasi* sovereignty, and is not responsible to individuals for a neglect or nonfeasance of its officers or agents. *Wheeler v. City of Cincinnati*, 19 Ohio St. 19; 2 Am. Rep. 368; *Bunkmeyer v. The City of Evansville*, 29 Ind. 187; *Western College of Medicine v. City of Cleveland*, 12 Ohio St. 375.

A consideration of the remaining ground of demurrer is rendered unnecessary.

*Judgment affirmed.*

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**HOUGAN, appellant, v. THE MILWAUKEE AND ST. PAUL RAILROAD COMPANY.**

(35 Iowa, 502.)

*Easement — percolating waters.*

Plaintiff granted to defendant "the right of way over and through his land for all purposes connected with the construction, use and occupation of its railroad." *Held*, that defendant had the right to dig a well upon the land covered by the deed, and to use the water supplied by percolation for railway purposes, though such well materially injured a valuable spring on plaintiff's adjacent land.

ACTION to restrain the defendant from further injury to plaintiff's spring, caused by a well dug by defendant on its right of way. The opinion states the case. A judgment was rendered by the court for defendant. Plaintiff appealed.



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Hogan v. The Milwaukee and St. Paul Railroad Company.

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*Willett & Bennett*, for appellant.

*Noble, Hatch & Fress*, and *J. Updegraff*, for appellee.

COLE, J. The testimony tended to establish that the plaintiff is the owner of eighty acres of land through which the line of railway now owned and operated by the defendant runs; that the defendant acquired its title to the railway, its property, franchise, etc., by conveyance to the McGregor Western Railway Company, which latter company acquired the right of way, etc., through the plaintiff's land, by a deed from the plaintiff which conveyed, "for all purposes connected with the construction, use and occupation of said railway, the right of way over and through" the land in controversy; upon the land were two springs, from one of which the defendant had acquired the right, by conveyances from plaintiff through others down to the defendant, to lay pipes and take water for the use of engines, etc.; this the defendant had unsuccessfully endeavored to do, and in the effort to make available the labor and expense incurred to do that, the defendant dug the well in controversy, on its right of way, near the reservoir and stationary engine constructed for the purpose of taking the water from said first spring; the effect of digging this well was to materially diminish, and at times nearly exhaust the supply of water in the other spring of plaintiff's, situated about one hundred and sixty feet from the well; the water comes into the well in three small streams on one side of it; the defendant dug the well in good faith, and without any intention or belief that it would interfere with the plaintiff's spring; the water is necessary for and is applied to purposes connected with the use of defendant's railroad.

The court must have found from the evidence, as a matter of fact, that the well was supplied with water finding its way thereto by percolation and not by a subterranean stream. No other finding would have any support in the evidence. This being so, and in the absence of malice or wantonness, the rule is well settled that the owner in fee may, in the reasonable use of his land, obstruct or divert the flow of such water, even to the injury of his neighbor's land, without being liable in damages therefor — *damnum absque injuria*; a rightful use of his own property, which he may enjoy, although thereby he may prevent his neighbor from having as full a benefit as otherwise might flow to him. Angell on Water-courses,

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and authorities cited in the notes, 2 Am. Law Reg. (N. S.) 65, and cases referred to; *Sweet v. Cutts*, 50 N. H. 439. There seems to be now no controversy as to the correctness of the rule as above stated.

But the defendant in this case is not the absolute and unqualified owner, or owner in fee, of the land whereon the well was dug. The defendant, however, is owner, by grant from plaintiff, of "the right of way over and through the land *for all purposes connected with the construction, use and occupation* of its railway." We have not been referred to, nor have we been able to find any case deciding this question. Upon principle it is very close, and yet we find ourselves agreed in holding with the learned judge who decided the cause below, that, under the terms of the conveyance and the facts of the case, the defendant had the legal right to dig the well, and cannot be enjoined from using the water therefrom for railway purposes.

It must be remembered that if the defendant can be enjoined from digging this well and using water therefrom, it can be enjoined from digging any well on its right of way. For, as we have seen by the rule above stated, if the right to dig the well exists, no damages can be recovered because of the diversion of the water from another. In other words, the fact of diverting or obstructing percolating water constitutes no basis of right in, or ground for an action by another. The cause of action arises from the wrongful act of digging the well, and not from the consequences which flow from it. For, if the right to dig the well exists, these latter are *damnum absque injuria*. Now, that the digging of wells to supply water to its engines is one of "the purposes connected with the use of a railway," can scarcely admit of a doubt. The right to locate a water tank upon its right of way cannot be more clear than the right to dig a well to supply it; both are equally necessary to operate the road, and are fairly embraced in the phrase, "all purposes connected with the construction, use and occupation of the railway."

But it may be suggested, that, if the defendant may dig for and obtain water on its right of way to use in operating its road, then it may dig for and obtain coal on its right of way, to use also for the same purpose. We would not now affirm this, yet the distinction is by no means broad. There is this difference, however: the use of water does not consume it; the use of coal does. Nature

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promptly fills the vacuum caused by using the former, but of the latter, never. The one may be kept for future use where nature deposited it or the ages made it; while the other is only for present use and cannot be held for posterity.

*Judgment affirmed.*

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**BURDEN v. SHERIDAN, appellant.**

(38 Iowa, 195.)

*Agency — resulting trust. Statute of frauds.*

Plaintiff employed defendant, by parol, as agent to buy certain lands for him.

Defendant bought the lands in his own name, gave his own notes for the purchase-money, and afterward claimed to hold the land as his own. *Held*, that plaintiff could not compel a conveyance of the lands to himself, and that there was no resulting trust which equity would enforce in plaintiff's favor.

A resulting trust cannot be sustained by parol evidence, where no part of the purchase-money was paid by the person claiming to be the *cestui que trust*.

SUIT in equity to enforce an alleged trust. The petition alleges, in substance, that one Hans Lawther was the owner of certain real estate near the city of Dubuque; that about the 21st day of April, 1871, and prior thereto, the plaintiff was negotiating with Lawther for the purchase thereof; that, for the purpose of consummating said purchase, the plaintiff employed the defendant Sheridan to act as his agent; that it was agreed between plaintiff and Sheridan that the negotiations for the purchase of said land should be conducted in behalf of plaintiff by Sheridan as the agent of the plaintiff, for which services Sheridan should receive a reasonable compensation; that plaintiff was willing to pay for said real estate the sum of \$4,500, if it could not be purchased for less than that sum, and so instructed his said agent; that with such instructions and understanding Sheridan undertook to aid plaintiff in making a purchase of the land for plaintiff; that plaintiff relied upon said Sheridan to conduct said negotiations and purchase, and by reason thereof omitted to take

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any part therein personally ; that, without the knowledge or consent of plaintiff, Sheridan fraudulently purchased said real estate in his own name and for his own benefit, for the consideration of \$4,500, giving his (Sheridan's) promissory note, falling due at different dates, for the entire purchase-money, and receiving from said Lawther a bond for a conveyance to said Sheridan upon payment, etc. ; that Sheridan denies the alleged agency and refuses to transfer the bond to the plaintiff, or in any manner to allow plaintiff the benefit of said purchase, claiming to have purchased the land in his own right and for his own benefit.

It is further alleged that, by reason of the fact that plaintiff owns land contiguous to the land in controversy and needs the same in order to the full use and enjoyment of what he now owns, the lands purchased by defendant are of peculiar value to plaintiff—greater in amount than the price at which they were purchased by defendant.

In an amendment to the petition it is averred that Sheridan entered into said agreement with plaintiff with the fraudulent design and purpose of thereby keeping plaintiff from competing with defendant in the purchase of the land, and to secure the same to himself upon better terms than he might otherwise have been able to do.

A decree is asked declaring Sheridan as holding the contract for the land as the trustee of plaintiff ; that he be adjudged to assign the bond of Lawther to plaintiff ; that Lawther be decreed to convey to plaintiff upon payment of the purchase-money.

The answer denies all the averments of the petition except defendant's purchase of the land from Lawther, giving his notes and receiving the bond for a deed, and pleads the statute of frauds.

The cause was tried by the court and a decree rendered for plaintiff.

Defendant Sheridan appeals.

*Smith, Fouke & Chapin*, for appellant.

*Adams & Robinson*, for appellee.

MILLER, J. The answer of the defendant Sheridan denies the contract alleged in the petition so as to put the plaintiff on proof of the same by competent evidence. No writing or document is

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offered to establish it, but it is sought to do so by parol evidence entirely. This is objected to by appellant as incompetent under the statute of frauds. That statute provides that no evidence of any contract for the creation or transfer of any interest in lands, except leases for a term not exceeding one year, is competent, unless it be in writing and signed by the party charged or by his authorized agent. Rev., §§ 4006, 4007. It is further provided in section 4008 that the above provision does not apply "where the purchase-money or any portion thereof has been received by the vendor, or where the vendee, with the actual or implied consent of the vendor, has taken and held possession thereof under and by virtue of the contract, or where there is any other circumstance which by the law heretofore in force would have taken a case out of the statute of frauds." It has accordingly been held by this court that a parol contract for the sale of real property, accompanied by a delivery of actual possession, is valid and binding. *Baldwin v. Thompson*, 15 Iowa, 504; *Davis, Sawyer & Co. v. Strohm*, 17 id. 421.

So, also, where the purchase-money has been paid by the vendee the contract to convey may be proved by parol. Id. And it has likewise been held in accord with the universal holding of all the authorities that where real estate is purchased by one person with money furnished by another, an implied or constructive trust arises, the former being held as a trustee for the latter, and that the facts establishing such trust may be proved by parol evidence. *Bryant v. Hendricks*, 5 Iowa, 256; *McCoy v. Hughes*, 1 G. Gr. 370; *Brooks v. Ellis*, 3 id. 527; *McIntire v. Skinner*, 4 id. 89; *Sullivan v. McLanans*, 2 Iowa, 437; *Holland v. Hensley*, 4 id. 222; *Sunderland v. Sunderland*, 19 id. 325, and cases cited; *Nelson v. Worrell*, 20 id. 469; *Fox v. Doherty*, 30 id. 334; see, also, 2 Story's Eq. Jur., § 1201, and notes.

But it is laid down by Judge STORY (2 Eq. Jur., § 1201a) that this doctrine of resulting or implied trusts "is strictly limited to cases where the purchase has been made in the name of one person and the purchase-money has been paid by another. For" (says he), "where a man employs another person by parol as agent to buy an estate for him, and the latter buys it accordingly in his own name, and no part of the purchase-money is paid by the principal, there, if the agent denies the trust, and there is no written agreement or document establishing it, he cannot, by a suit in equity, compel the agent to convey the estate to him; for (as has been

truly said) that would be decidedly in the teeth of the statute of frauds." The same doctrine, in nearly the same language, is stated in Sugden on Vendors and Purchasers, vol. 2, 9th ed., p. 163. The author of Browne on Frauds, § 96, says: "It seems to have been held that where, in a case of trust arising upon an agency, parol evidence was inadmissible to prove it; but the later English cases favor a contrary doctrine."

The first case cited by Story and Sugden respectively in support of the doctrine stated by them is *Bartlett v. Pickersgill*, 1 Eden, 515; also found in 4 East, 577, note. The defendant in that case, under a verbal agreement, bought an estate for the plaintiff; no part of the purchase-money was paid by the plaintiff. The defendant articulated for the estate in his own name and refused to convey to the plaintiff. There being no written evidence that the estate was purchased for the plaintiff the question was, whether the plaintiff might give parol evidence thereof. The court said: "To allow it" (the evidence) "would be to overturn the statute of frauds \* \* \*. It is not like the case of money paid by one man, and a conveyance taken in the name of another. If I were to allow the evidence in the present case, I do not know a case where the statute would take place." It is also held that if Bartlett had paid any money, it would render the evidence competent, but as he had not, the bill was dismissed. The case of *Crop v. Norton*, 9 Mod. 233, holds that a resulting trust could not be sustained where only a part of the purchase-money was paid by the person claiming to be *cestui que trust*.

In *Botsford v. Burr*, 2 Johns. Ch. 405, Chancellor KENT, in his opinion, says: "If the party who sets up a resulting trust made no payment, he cannot be permitted to show, by parol proof, that the purchase was made for his benefit, or on his account. This would be to overturn the statute of frauds; and so it was ruled by Lord Keeper HENLEY in the case of *Bartlett v. Pickersgill*," *supra*. He further says: "To admit it, would be repealing the statute of frauds, and would endanger the security of real property resting in title by deed. Nor would a subsequent advance of money to the purchaser, after the purchase is complete and ended, alter the case \* \* \*; for the trust arises out of the circumstance that the moneys of the real, and not of the nominal purchaser, formed, at the time, the consideration of that purchase and became converted into the land."

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In *Steere v. Steere et al.*, 5 Johns. Ch. 1, the bill charged that the defendants purchased the land pursuant to an agreement that they were to do so as plaintiff's agents, etc., and Chancellor KENT in the opinion says, in reference to certain lots which constituted a part of the purchase: "If any trust exists as to them, \* \* \* it is a trust by implication or operation of law, and such a trust cannot be made out but by showing the actual payment of the money by the *céstiui que trust*, or an actual loan by him for that purpose, citing *Botsford v. Burr*, *supra*, and quoting in full the rule as stated by Sugden and Story, before referred to.

In *Pinnock v. Clough*, 16 Vern. 500, the defendant purchased a farm for the plaintiff, but there was no *written* agreement between them, nor did the plaintiff pay or advance *at the time* any portion of the purchase-money. The defendant took the deed in his own name, paid part of the consideration, and gave security for the remainder. On a bill filed to compel a conveyance it was held that no such trust was created by the transaction as could be enforced in equity. The learned judge, delivering the opinion in that case, cites and approves the case of *Bartlett v. Pickersgill*, *supra*, and quotes with approval the rule laid down by Sugden, and then says: "I am not aware that the doctrine of the case of *Bartlett v. Pickersgill* has been impugned. Its authority is fully recognized by Chancellor KENT in *Boyd v. McLain*, 1 Johns. Ch. 582; in *Botsford v. Burr*, 2 id. 405; and in *Steere v. Steere*, 5 Johns.; and by Judge STORY, in *Smith v. Burnham*, 3 Sumn. 464."

In this case of *Smith v. Burnham* the bill alleged that the parties had agreed to become partners in purchasing and selling lands and lumber upon a joint capital furnished by both, the profit and loss to be equally shared between them. The bill then alleged that defendant had, in pursuance of the agreement, made certain purchases of land and lumber, and that plaintiff had made certain advances in money to the defendant on the same account. The prayer was for a dissolution of the partnership, a settlement of the firm accounts, and that the defendant should be decreed to *convey to plaintiff his equitable share of the lands remaining unsold*. The statute of frauds was insisted upon, and on a review of the authorities the court held that the plaintiff could not found an equitable claim to a conveyance upon *parol evidence*. The case of *Thorn v. Thorn*, 11 Iowa, 146, which involved the same question, was decided on the authority of the case of *Smith v. Burnham*.

In *Perry v. McHenry*, 13 Ill. 227, it was held that no subsequent arrangement, made after the purchase, nor any parol agreement made at the time or prior, that the purchase is to be made for the benefit of some other person, will raise a trust in such person's favor, in the absence of any other fraud than that which arises from the violation of the purchaser's parol agreement, where he takes the title in his own name and pays the consideration out of his own funds. And *Bartlett v. Pickersgill* is again cited for this holding. The case of *Perry v. McHenry* is followed in a very recent case in the same court, where a purchaser of lands, under a decree of foreclosure of a mortgage, took the title in his own name and gave his note for the purchase-money; it was held that an express trust could not arise in favor of the holder of the equity of redemption, on a parol agreement between himself and the purchaser, made at a time prior to the sale, that the purchaser should make the purchase and hold the title for the benefit of and in trust of such owner of the equity of redemption, and as security for the advances made by the purchaser. Such a trust, resting merely on parol, was held to be within the statute of frauds. *Walker v. Klock et al.*, 55 Ill. 362.

The cases we have cited, both English and American, fully sustain the doctrine announced by Story and Sugden, above referred to.

In support of the statement in Brown on Frauds that "the later English cases favor a contrary doctrine," three cases are cited. The first of these is *Bartlett v. Pickersgill*, which we have seen is the leading case, from which Story and Sugden deduce the rule stated by them.

The next case cited by Mr. Brown is *Taylor v. Salmon*, 4 Mylne & Craig, 134. In that case Salmon was the agent and one of the stockholders of a mining company, and in that capacity proposed in writing for the company to procure from Lord Dunally a lease of certain mineral lands. The latter accepted in writing. Salmon afterward undertook to have the lease executed to himself for his own benefit. On a bill being filed to compel Lord Dunally to execute the lease to the company it was held that the proposition by Salmon was clearly for the company, and being accepted the contract on its face was on behalf of the company, and, Lord Dunally not objecting to granting the lease to the company, a decree was accordingly entered. There was no question of the compe-



tency of parol evidence. The other case, *Dale v. Hamilton*, 5 Hare, 369, 26 Eng. Ch., decides that a partnership agreement between A and B that they shall be jointly interested in a speculation for buying, improving for sale and selling lands, may be proved without being evidenced by any writing signed by, or by the authority of, the party to be charged therewith, within the statute of frauds. This decision is based upon the doctrine that where a partnership or an agreement in the nature of a partnership exists between two persons, and land is acquired by the partnership as a substratum for such partnership, as well as where it is acquired in the course of the business, and that the partnership being proven as an independent fact, the court without regard to the statute of frauds would inquire of what the partnership stock consisted, whether of land or property of any other nature. That being the property of the partnership, it would not be treated by the court as land, but as personal property of the partnership.

Without stopping to examine the soundness of the decision in this case, it is sufficient to say that it is not in conflict with the doctrine stated by Sugden and Story, and does not support the text in *Brown on Frauds*. Counsel for appellee have also cited *Lees v. Nuttall*, 1 Russell & Mylne, 53. In that case the wife of plaintiff and her sister, as administratrixes of their father, were entitled to a mortgage debt charged on the premises in question, and the plaintiff and his wife, with the sanction of his sister, had long been in possession. He was desirous of purchasing the equity of redemption from Walker, the owner. Walker proposed by letter to sell to plaintiff at a price named therein. Plaintiff accepted and instructed Nuttall, who had been acting as his attorney in previous negotiations for the property, to draw up a formal agreement of purchase and to procure Walker's signature to it. Within a day or two afterward Nuttall went over to the place of residence of Walker, and in his own name and behalf entered into an agreement for the purchase.

The defendant Nuttall claimed in his answer the benefit of the purchase, stating that for two months before the purchase he had been in treaty with Walker for the purchase of the equity of redemption; that he entered into the agreement on his own account, and that he did not in the transaction consider himself as the attorney of Lees. He did not plead or insist on the statute of frauds.

The report of the case states that "the material facts of plaintiff's case were established by evidence." The character of the evidence does not appear. It is to be presumed, however, that it was competent evidence.

The Master of the Rolls, on the ground that Nuttall had been employed by plaintiff as his agent for the purchase of the estate, entered a decree for plaintiff. No question as to the competency of parol evidence was involved in the case.

This case of *Lees v. Nuttall* is cited in 2 Story's Eq. Jur., § 1211 a, in support of the doctrine there stated, that "if an agent, who is employed to purchase for another, purchases in his own name or for his own account, he will be held a trustee of the principal at the option of another." There can be no doubt of the soundness of this doctrine whenever the facts are established by competent evidence, and this is not in conflict with the doctrine already quoted from the same author, and which the authorities already cited fully sustain. This is upon the general doctrine that whatever acts are done by trustees in respect to the trust property shall be deemed to be done for the benefit of the *cestui que trust*, and not for the benefit of the trustee. 2 Story's Eq. Jur., § 1211, and notes. And the same principle is applied to persons standing in other fiduciary relations to each other, such as attorneys and agents. Id., § 1211 a. But this relation must be admitted or established by competent evidence before a court of equity will declare or enforce the trust.

With this understanding there is no material conflict in the authorities upon the question we have been considering. We think the doctrine well sustained that, where one man merely employs another by parol as an agent to purchase real property for him, and the person thus employed purchases the land in his own name, and no part of the purchase-money is paid by the principal, and the agent denies the trust, it would directly overturn the statute of frauds to admit any other evidence than that which the statute requires.

We think this doctrine is not impugned by *Bryant v. Hendricks*, 5 Iowa, 256, or by *Judd v. Mosely*, 30 id. 438. In the former case different persons *had claims on and were interested* in certain public lands. They made an oral agreement that one party thus interested should enter the whole land in his own name, the others to pay each his proportion toward the entry; and when a survey

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was made, and the parcel of each ascertained, the one entering the whole should convey to the others their respective parcels. This was held not within the statute of frauds.

In the case of *Judd v. Mossely*, the owner of land sold at tax sale and the purchaser verbally agreed that the former need not redeem in order to save his rights; that the purchaser should receive the tax deed at the expiration of the term of redemption, and then quitclaim to the owner upon his paying to him the amount he would be required to in order to redeem under the law, and by reason of such representations and agreements the owner was deterred from making redemption within the time allowed by law. It was held that this was not within the statute of frauds, but that a trust was created in favor of the owner of the land which could be enforced against the tax purchaser.

In each of these cases there is something more than a mere agreement by parol to convey to the respective plaintiffs. The plaintiffs had in each case acquired rights in the respective premises at the time the agreements were made. In the latter case the plaintiff was the legal owner of the land, subject to defendant's lien for taxes. This lien plaintiff could have extinguished within the time the law prescribed, which had not yet expired. The agreement was, in substance, an extension of the time. To have allowed defendant to take advantage of his tax deed, acquired under the circumstances disclosed in the case, and repudiate his agreement, would have enabled him to perpetrate a gross fraud upon the other party.

We come now to consider whether there has been such fraud on the part of the defendant as will take the case out of the statute.

[The court found that there had not. The remainder of the opinion is not important.]

## MULLIGAN V. ILLINOIS CENTRAL RAILWAY COMPANY.

(36 Iowa, 181.)

*Common carrier — liability for goods shipped to a point beyond the line.*

The acceptance by a railroad company of goods marked to a designation beyond the terminus of its road creates a *prima facie* liability to transport to and deliver the goods at that point, which, however, may be modified by proof of a different usage known to the shipper at the time of making the consignment.

While the law imposes upon common carriers the duty of carrying all goods offered to them in the usual course of business, it does not impose upon them the duty of transporting goods beyond the termini of their respective routes, and they may, therefore, by special agreement, contained in a bill of lading or receipt, lawfully stipulate that they shall not be liable beyond such point.

By the shipper accepting and acting upon such bill of lading, his knowledge of its stipulations will, in the absence of fraud or mistake, be conclusively presumed, and he will be bound thereby. He will not be permitted to show that he was ignorant of its contents.

ACTION for the value of 1,440 pounds of bacon and 20 tubs of butter, which were shipped upon the defendant's line of railway, consigned to C. T. Buddecke & Co., New Orleans, and which failed to reach the consignee. Evidence was introduced tending to show that at the time of shipment the agent of defendant delivered to plaintiff a receipt or bill of lading, the material portion of which is as follows :

“ READ THIS CONTRACT.”

“ DUBUQUE STATION, *Sept. 4, 1871.*

“ Received of James Mulligan, in apparent good order, by the Illinois Central Railroad Company, consigned to ———, the following articles, as described in the margin, to be transported to ——— station, subject to conditions and regulations as per published tariff of said company, and payment of freight and such other expenses or charges as may have occurred on said articles. It is expressly agreed and understood that the company are not responsible for loss of goods of which the contents are unknown. \* \* \* And it is further expressly understood that for all loss and damage occurring in the transit of said property, the legal remedy

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shall be against the particular carrier or forwarder only, in whose custody the said property, whether by delay, or otherwise, may actually be at the time of the happening thereof, it being understood that the said Illinois Central Railroad company assumes no other responsibility as to said property, than such as may be incurred on its own road. \* \* \*

Marks and Consignee.	No.	Description of articles.	Weight.
C. T. B. & Co., New Orleans, La..	1	Box meat .....	1,440 lbs.*

The bill of lading for the butter was in all respects like the above, except as to date and description of property. There was no proof of any contract on the part of defendant further than as implied from the receipt of the goods marked and consigned as above stated, and the execution of the bills of lading. It was proved upon the trial that the defendant was incorporated under special statute of the State of Illinois, and authorized to construct, maintain and operate a railroad, from the southern terminus of the Illinois and Michigan canal to the city of Cairo, with certain lateral branches, and that Cairo is the southern terminus of defendant's line of road. Evidence was also introduced tending to show that at the time of the shipment aforesaid, and prior thereto, the defendant held itself out as carrier of freight south of Cairo, only so far as to deliver it to connecting lines, and that in due time, and in the regular course of business according to its usual custom, it shipped the meat on the steamer Indiana, and the butter on the steamboat Virginia, boats running between Cairo and New Orleans, and took the proper receipts of the respective clerks therefor. It was shown that the Indiana is still running, and that the Virginia was sunk at Cottonwood Point, in the Mississippi river, in October, 1871.

Against the objection of defendant plaintiff was permitted to testify that he did not know when he shipped the goods that defendant undertook to limit its liability to Cairo, and that he did not accept the receipt with the knowledge of the condition contained therein, nor with the intention of assenting that the Illinois Central Railroad Company should not be bound beyond its own line of road. Jury trial. Verdict and judgment for plaintiff for \$380.41. Defendant appeals. The further necessary facts are stated in the opinion.

*Orane & Rood*, for appellant.

*Smith, Fiske & Chapin*, for appellee.

DAY, J. The court instructed the jury as follows :

"If you find that defendant received the goods in controversy consigned and marked for New Orleans, then in the absence of any agreement, limiting its liability, it was bound to deliver the same at New Orleans, and if it failed so to do, it would be liable in this action. But such liability may be changed by a special contract, and if defendant, at the time of receiving the goods, executed to plaintiff the receipts admitted in evidence, and plaintiff received the same knowing their contents, then defendant is not liable in this action.

The defendant excepted to this instruction, and now assigns the giving of the same as error.

This instruction embraces three propositions :

*First.* The liability incurred by a railroad company by the simple acceptance of goods consigned to a point beyond the terminus of its road.

*Second.* How this liability is affected by the delivery to, and acceptance by, the shipper of a bill of lading limiting liability to its own line of road.

*Third.* The effect of ignorance, upon the part of the shipper, of the conditions contained in the bill of lading accepted by him.

A discussion of these propositions will embrace the leading questions presented by this appeal.

I. *As to the liability which a railroad company incurs by the mere acceptance of goods consigned to a point beyond the terminus of its road.*

Upon this question there is a striking lack of uniformity in the decisions. There are three views which have been maintained by their respective advocates, with, perhaps, equal cogency of reasoning :

*First.* That where carriers receive and receipt for goods consigned to a point beyond the terminus of their road, without any special contract respecting the same, the agreement is one for transportation the whole distance, upon which the first carrier may be sued for a loss occurring after the goods have passed beyond the terminus of its road.

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The first case which has generally been cited as announcing this doctrine is *Muschamp v. Lancaster R. R. Co.*, 8 M. & W. 424, decided in the Court of Exchequer in 1841, followed and re-enforced in *Collins v. Bristol & Exeter R. R. Co.*, 11 Exch. 790, and extended even to goods booked beyond the limits of England. See, also, *Illinois Central R. R. Co. v. Copeland*, 24 Ill. 332; *Angle & Co. v. The Mississippi & Missouri R. R. Co.*, 9 Iowa, 487.

*Second.* That where a carrier receives goods marked for a particular designation beyond the terminus of its line, and does not expressly undertake to deliver them at the point designated, the implied contract is only to transport over its own line, and forward, according to the usual course of business, from its terminus. See *McMillan et al. v. M. S. & N. I. R. R. Co.*, 16 Mich. 120; *Van Santvoord v. St. John*, 6 Hill, 157; *Farmers and Mechanics' Bank v. Champlain Transportation Co.*, 23 Vt. 186; *Brintnall v. The Saratoga and Whitehall R. R. Co.*, 32 id. 665; *Hood v. N. Y. & New Haven R. R. Co.*, 22 Conn. 1 and 502; *Elmore v. Naugatuck R. R. Co.*, 23 id. 457; *Naugatuck R. R. Co. v. The Waterbury Button Co.*, 24 id. 468; *Nutting v. Conn. R. R. Co.*, 1 Gray, 502; *Burroughs v. Norwich and Worcester R. R. Co.*, 100 Mass. 23; S. C., 1 Am. Rep. 78; *Darling v. R. R. Co.*, 11 Allen, 295; *Root v. The Great Western R. R. Co.*, 45 N. Y. 524; *Jenneson v. Camden and Amboy R. R. Co.*, 4 Am. Law Reg. 234; *United States Express Co. v. Rush et al.*, 24 Ind. 403; *Pennsylvania Central R. R. Co. v. Schwarzenberger*, 45 Penn. St. 208; *Rome R. R. Co. v. Sullivan, Cabot & Co.*, 25 Ga. 228.

*Third.* That the mere acceptance of goods by a common carrier, marked to a designation beyond the terminus of its line, as a matter of law imports no absolute undertaking upon the part of the carrier beyond the end of its road, but is a matter of evidence to be submitted to the jury, from which, in connection with other evidence produced, they are to determine, as a question of *fact*, the real engagement entered into.

This position was very ably maintained in a recent and elaborate opinion of the Supreme Court of New Hampshire, reviewing almost the whole current of decisions from *Muschamp v. The Lancaster Railway Co.*, 8 M. & W. 421, down to the present period. See *Gray v. Jackson*, 51 N. H.; S. C., 12 Am. Rep. 1. The question is not an open one in this State. In *Angle v. The M. M. R'y Co.*, 9 Iowa, 487, the rule was settled as it is understood to exist in

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England, and it was held that the acceptance, by a carrier, of goods marked to a designation beyond the terminus of its road, creates a *prima facie* liability to transport to and deliver at that point, which may be modified by proof of a different usage known to the shipper at the time of making the consignment.

The court did not err, therefore, in the first branch of the foregoing instruction, as applied to the evidence introduced, there being no proof that plaintiff knew of a usage of the defendant not to transport freight beyond Cairo.

II. *As to the effect of the bill of lading :*

The law imposes upon common carriers the duty of carrying all goods offered to them in the usual course of business, when they have the means transportation and the proper compensation is tendered.

But the law does not impose upon such carriers the duty of undertaking to transport goods beyond the termini of their respective routes.

Whenever liability for such transportation exists, it arises either from express contract or from an implied agreement arising from the acceptance of goods consigned to points beyond the termini of their routes. As they are originally under no obligation to undertake to transport beyond the end of their lines, it is clear that they may, by special agreement, stipulate that they shall not be liable beyond such point. *Fowles v. Great Western Railway Co.*, 16 Eng. L. and Eq. 531 ; *Pierce on Railroad Law*, 458 ; *Detroit & Milwaukee R. R. Co. v. Farmers & Millers' Bank of Milwaukee*, 20 Wis. 122.

A bill of lading possesses the *dual* character of a receipt, evidencing the delivery of the goods to the carrier's possession, and a contract containing the stipulations under which the transportation is to be undertaken. The only reasonable construction which can be placed upon the bill of lading in this case is that it contains a positive stipulation that the defendant does not agree to carry beyond the terminus of its road. It is not an agreement to carry beyond such terminus, with a stipulation that it shall not be liable for injuries happening beyond that point. It concludes as follows: *it being understood that the said Illinois Central Railroad Company assumes no other responsibility as to said property than such as may be incurred on its own road.*

What are the duties of a common carrier respecting goods placed in its possession for transportation ? To convey them safely and



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with reasonable dispatch as far as its agreement extends, and to forward thence according to the usual course of business. Does, then, this company undertake to carry to New Orleans, and at the same time stipulate that for a refusal to perform this agreement it shall not be responsible? This construction involves an inconsistency.

The provisions of this bill of lading are not in conflict with chapter 113, Laws 1866, which simply provides that, when the duties of a common carrier are undertaken, the company shall not, by receipt, rule or regulation, exempt itself from the full liabilities of a common carrier, which, in the absence of such contract, etc., would exist. The effect of the agreement in this case is that the defendant did not assume the duties of a common carrier beyond Cairo, the southern terminus of its road. It is clear to us that if this contract was so accepted or acted upon by the plaintiff as to be binding upon him, the defendant is not liable for a loss occurring beyond the limit of its line of road.

III. *As to the effect of the shipper's ignorance of the terms of the bill of lading by him accepted.*

From the abstract it appears that the conditions in this bill of lading were printed upon its face, and the attention of the shipper was called thereto by the direction, "*Read this contract,*" printed in italics. There is no evidence of any fraud, imposition or mistake. A bill of lading, like a deed poll and many other classes of contracts, is signed by one party only, and in such case the evidence of assent upon the part of the other party usually consists in his accepting and acting upon it. And the evidence of assent derived from his acceptance of the contract without objection is usually conclusive. In this case the defendant tendered to the plaintiff a contract containing the stipulations and conditions under which defendant was willing to undertake the transportation of the goods offered, and challenged an examination of its contents by the first sentence which would have met the plaintiff's eye, if he had taken the trouble to look at it. From an acceptance of this paper without protest or objection, the defendant had a right to presume that plaintiff assented to its terms. It would therefore operate as a fraud to permit plaintiff now to say, "I did not read the bill of lading, was not aware of its contents, did not know that you undertook to limit your liability to Cairo, and did not assent that you should do so."

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It not appearing that any fraud or imposition was practiced, nor that any mistake intervened, the plaintiff must be conclusively presumed to have become acquainted with its contents, and if he did not do so the consequences of his folly and negligence must rest upon himself. Courts cannot undertake to relieve parties from the effects of such inattention and want of care. If once they should enter this doubtful domain, it is impossible to foresee to what lengths their interference might be pressed, or of what limits it would finally admit.

These views are abundantly sustained by authority. For a full and masterly discussion of the question, see opinion of COOLEY, J., *McMillan et al. v. M. S. & N. I. R. R. Co.*, 16 Mich. 80, and cases there cited; also, *Kalkman v. U. S. Ex. Co.*, 3 Kan. 205; *How v. New Jersey Steam Nav. Co.*, 11 N. Y. 491; *Hopkins v. Wescott et al.*, 7 Am. Law Reg. (N. S.) 533.

In Illinois it is held, but contrary, as we believe, to the weight of authority, that it is a question of fact whether a party accepting a bill of lading knew of its conditions and assented thereto. *Merchants' Union Ex. Co. v. Joseph Schier*, 55 Ill. 140.

In making the defendant's discharge from liability, under the bill of lading, to depend upon the plaintiff's knowledge of the contents thereof, and in submitting to the jury, under the circumstances of this case, the question of such knowledge, the court, in our opinion, erred.

IV. For the reasons above stated there was also error in allowing the plaintiff to testify that he did not accept the receipt with a knowledge of the condition contained therein, nor with the intention of assenting that the defendant should not be bound beyond its own line of road.

V. But one further question demands our consideration. In his original petition plaintiff alleges that at the time he shipped the bacon and butter, he received therefor receipts, and he attaches them as exhibits to his petition. These receipts are the same as the bill of lading set forth in the preceding statement of facts.

Afterward the plaintiff filed a substituted petition, in which he states that he withdraws all pleadings before filed. In this he makes no mention of having received any receipts or bills of lading at the time of shipment. The defendant asked the court to instruct the jury that "The plaintiff in his pleadings admits that, at the time

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the goods mentioned in his petition were delivered to defendant, he received from said defendant bills of lading or receipts therefor."

The court refused to give this instruction, and such refusal is assigned as error. In our opinion the instruction should have been given. Although the plaintiff stated in his substituted petition that he withdrew all pleadings before filed, yet this did not operate to withdraw from the files the original petition. Rev., § 2983. It ceased to tender any issue to which defendant was called upon to respond, or which plaintiff might make the foundation of his claim. Yet it remained a part of the record in the case, containing a distinct and solemn admission of a fact.

And in the absence of any showing that this admission was made improvidently or through mistake, it must be taken as conclusive. 1 Greenl. on Ev., §§ 205, 206.

*Judgment reversed.*

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POWESHIEK COUNTY V. DENNISON, appellant.

(26 Iowa, 244.)

*Mortgage—foreclosure for installment.*

An action was brought to recover interest due and unpaid upon a contract in the nature of a mortgage, in which a judgment and decree of foreclosure was rendered, and the property sold. *Held*, that a second action, to foreclose and sell the property for the balance due on the contract, could not be maintained.

Foreclosure for an installment due before the principal amount, and a sale of the property thereunder, exhausts the remedy of the creditor in this respect, and passes a clear and absolute title to the purchaser.

**ACTION** to foreclose a school-fund contract, which was as follows:

"Contract made and entered into between Wm. H. Barnes as school fund commissioner for the county of Poweshiek, Iowa, and Samuel M. Dennison, witnesseth, that the said school fund commissioner has bargained and sold, and by these presents does bargain and sell to the said Dennison, the following described land, being a portion of section numbered sixteen granted to the State for the use of the schools by an act of congress, viz.: the south-east one-fourth of section 16, in township 81, range 16. The price

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agreed upon \$1.50 per acre, amounting to \$300; the one-fourth of which, \$75, has been paid in cash, and the balance, \$225, secured by a promissory note of even date herewith, payable on or before ten years from date, bearing interest at ten per cent per annum, payable annually on the 1st of January. Now if the said Dennison shall pay or cause to be paid the interest on said note as the same becomes due, and the principal, within the time specified, then he will be entitled to receive from the governor of Iowa a patent for the land herein described. In case of a failure to make any of the payments aforesaid, punctually as stipulated, all previous payments shall be considered forfeited, and the land be subject to sale by the school fund commissioner, or the payment of the money enforced according to law, at the option of said commissioner."

It was alleged in the petition that subsequently to the execution of the contract, the interest on the note becoming due and delinquent, "suit was commenced upon the note and contract, and at the December term, 1862, of the district court of said county, a judgment was rendered for the interest then due and unpaid, amounting to \$60.10, and a decree of foreclosure entered, directing the sale of the said land for the purpose of satisfying the judgment. That, afterward, a special execution was issued, and the land levied upon and sold, for the sum of \$99.18, more than sufficient to satisfy the judgment and costs, which was applied upon the principal of the note, leaving an unpaid balance of the principal of \$125.82; that no patent or conveyance has ever been made by the State to the purchaser at the sheriff's sale, who has conveyed to some of the defendants who now claim the land."

A judgment for the balance of principal and interest due on the note, and a decree of foreclosure directing the sale of the land in satisfaction thereof, is prayed.

The defendants, claiming the land through the purchaser at the sheriff's sale, demurred to the petition, which being overruled they appeal.

*SeEVERS & CUTTS* and *W. R. LEWIS*, for appellants.

*BALLARD & HALL*, for appellee.

MILLER, J. The only question raised by the demurrer, and presented in argument, is whether a former action having been brought upon the note and contract for interest due and unpaid, in which a

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judgment and decree and foreclosure was rendered, upon which a special execution was issued and the land sold thereunder, a second action, to foreclose and sell the land for the balance due on the note, can be maintained?

At the time of making this contract the school fund commissioner of the county was authorized by law to sell these lands (§§ 1044, 1048, of the Code of 1851), and the contract above set out is in compliance with the requirements of the law. Code of 1851, §§ 1048, 1050, 1052. The last section (1052) provided that "if any person fail to pay the interest due on any contract, as hereinbefore mentioned, it shall be lawful for the school fund commissioner, in his discretion, either to consider the contract as forfeited and proceed to sell the land anew upon the terms prescribed in the fifth section of this act, or to collect the same by suit. This provision being also embodied in the contract, there can be no doubt that this option could be lawfully exercised by the school fund commissioner or by his legal successor. Nor can there be any doubt that the statute, in authorizing suit to be brought to collect the interest due and unpaid, intended thereby to authorize the bringing of any appropriate and proper action for that purpose which might be brought by an individual under like circumstances; and if there was a choice of remedies, that the school fund commissioner had the same right of choice as a private person. Upon a default in payment of interest, an action at law could have been maintained therefor. Or by the statute in force when this contract was executed, a vendor of real property, when any part of the purchase-money was due and unpaid, might bring an action "to compel the purchaser to perform his contract, or to foreclose and sell his interest in the property." And in such cases, for the purpose of the foreclosure, the vendee is treated as a mortgagor of the property purchased, and his rights foreclosed in a similar manner. Code of 1851, §§ 2094, 2095. At the time of the former foreclosure such was, and still is, the law. Rev. of 1860, §§ 3671, 3672.

It has been held by this court that it was the design of these provisions of the statute to place the vendor and vendee of real estate in the same position, so far as related to the remedy, and the mortgagor and mortgagee in cases of express mortgages. *Pierson v. David*, 1 Iowa, 23; *Blair & Co. v. Marsh*, 8 id. 144; *Hershey v. Hershey*, 18 id. 24. This last case further holds that the vendor may, at his election, either proceed at law to recover the purchase-

money, or any unpaid installment thereof, or treat the vendee as a mortgagor, and foreclose, as in the case of an actual mortgage.

What, then, is the effect of a foreclosure and sale of the land for an unpaid installment of the purchase-money, or for interest due prior to the maturity of the principal?

In the case of express mortgages the doctrine is well established that a sale of the mortgaged premises, in pursuance of a decree of foreclosure, passes to the purchaser at such sale all the title and interest of both mortgagor and mortgagee in and to the property sold. *Lansing v. Goelett*, 9 Cow. 346; *Holden v. Sackett*, 12 Abb. Pr. 473; *West Branch Bank v. Chester*, 1 Jones (11 Penn. St.), 282; *Pierce v. Potter*, 7 Watts, 477; *Berger v. Heister*, 6 id. 214; *McCall v. Lennox*, 9 Serg. & Rawle, 302; *Packer v. Rochester & S. R. R. Co.*, 17 N. Y. 287; *Tallman v. Ely*, 6 Wis. 244; *Hodson v. Treat*, 7 id. 263; *Ritger v. Parker*, 8 Cush. 145; *Brown v. Tyler*, 8 Gray, 135; *Stark v. Mercer*, 3 How. (Miss.) 377; *Marston v. Marston*, 45 Me. 412; *Hayes v. Wellington*, 25 id. 458; *Carter v. Walker*, 2 Ohio St. 339. See, also, *Kelly v. Payne*, 18 Ala. 371; *Bradford v. Harper*, 25 id. 337; *Clower v. Rawlings et al.*, 9 Smedes & Marsh. 122; *Hope v. Booth*, 1 Barn. & Adolph, 498; *Hobby v. Pemberton*, Dudley (Ga.), 212.

In *Horback v. Riley*, 7 Penn. St. 81, it was held that a vendor of land under articles to convey, selling the land on execution upon a judgment for the unpaid purchase-money, passes both the estate of his vendee and his own legal title discharged of the lien of the purchase-money. In *Amory v. Riley et al.*, 9 Ind. 490, it was held that where the vendor of real estate retains the legal title, it must be intended that he holds it as a security for the unpaid purchase-money, that all the incidents of a mortgage, so far as the lien is concerned, attach to the contract of sale; and that upon a sheriff's sale on foreclosure the title of the vendor passed to the sheriff's vendee, on the principle that the effect of a sale under a mortgage is to vest an absolute title in the purchaser.

In *Codwise v. Taylor*, 4 Sneed (Ky.), it was held that where the vendor of land enforced his lien for that part of the purchase-money, which is due, there being a part that is not due, he thereby exhausts his lien as to the latter.

These cases establish the doctrine that the effect of a judicial sale on foreclosure of a vendor's lien for the purchase-money, is the same as a sale on the foreclosure of an express mortgage; that is to

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say: the purchaser at such sale takes an absolute title to the premises sold, and further, that this result follows where the whole of the premises, upon which the purchase-money was a lien, has been sold for an installment due, although there may be other installments not yet due. It has also been held that a sheriff's sale of mortgaged premises upon a judgment obtained for the *interest* due upon a mortgage debt, which was payable *in futuro*, effects a virtual foreclosure of the mortgage, extinguishes the equity of redemption in the mortgagor, transfers to the purchaser the legal estate still in him, and divests the lien of the mortgage. *West Branch Bank v. Chester, supra*.

That it might be competent under a contract like the one in this case for the courts, in a foreclosure suit for an installment of interest due, to decree a sale of the purchaser's interest only, subject to the lien for the principal and interest not yet due, is perhaps true; in which case the purchaser would take the land under the terms of the decree and sale, subject to such further lien. See *Cox v. Wheeler*, 7 Paige, 248. But in this case the decree of foreclosure, as stated in the petition, was general, "directing a sale of the *land* for the purpose of satisfying the judgment" rendered for the interest unpaid, and under this decree "the *land* was sold," without limitation, condition or reservation. The purchaser at the sheriff's sale, therefore, under the established doctrine above discussed, took the land discharged of the lien for the balance of the purchase-money remaining unpaid after the application of the proceeds of the sale. The demurrer should have been sustained.

*Reversed.*

## GRAVES V. GRAVES.

(28 Iowa, 210.)

*Alimony — may be granted where divorce is not sought.*

A court of equity has jurisdiction of a suit for alimony alone, and will grant the same in a proper case, though no divorce or other relief is sought.

ACTION for alimony. The plaintiff alleges that she and the defendant were duly married on the 28th day of May, 1867, in the

State of New York; that she then had property worth \$138, which defendant converted to his own use; that they at once removed to the State of Wisconsin, where they lived together till May, 1869; that she then, at the defendant's request, returned to her friends in New York, where she has ever since remained; that as the fruit of the said marriage, she had then born a daughter, now aged about two years. That immediately after plaintiff left for New York, the defendant was guilty of adultery with one Augusta, and had continued ever since to live in adulterous intercourse with her; that the defendant is worth \$6,000, and has failed to support the plaintiff or their child, and that both are in destitute circumstances; that it costs \$50 per month to support them, and she asks an allowance and judgment for that amount from May 11, 1869, to date, and for \$300 to pay attorney's fees, etc.

The defendant denies the several allegations of the petition, except the marriage, the living together, and plaintiff's return to New York, and avers that he has not sufficient knowledge to form a belief whether the child is the fruit of the marriage. And he also sets up that, in March, 1871, he obtained a divorce from plaintiff in the District Court of Polk county, and set out a copy of the decree.

The plaintiff by reply averred that the decree was obtained by fraud, and that the court had no jurisdiction of the parties, either by residence or notice.

On the 6th day of March, 1872, the cause was tried to the court, who found that the parties were lawfully married, March 28, 1867, and lived together in Dodge county, Wisconsin, until the 11th day of May, 1869, and that the child, Lydia S., was the fruit of the marriage; that, on the day last named, the defendant, without cause, deserted the plaintiff and came to Story county, Iowa, and has ever since lived in open adultery with an abandoned woman, and has failed and refused to provide for either his wife or child, or furnish them any means of support. It also appears that the defendant never resided in Polk county, where he obtained a decree for divorce; that the cause assigned for it was false and fraudulent, and there is nothing to show that any notice whatever was ever given to, or served upon the wife, the defendant in that action.

The District Court thereupon rendered a judgment for the plaintiff, for \$850 for past support, and \$150 to pay attorneys, and also ordered that defendant pay to plaintiff \$25 per month, commencing



ing March 11, 1872, payable semi-annually, for the alimony or support of the plaintiff and her child, during her life, or so long as the bonds of matrimony exist, and made the same a lien upon the defendant's real estate, describing it.

The defendant appealed.

*Dana & Balliett*, for appellant.

*J. S. Frasier* and *John A. McCall*, for appellee.

COLL, J. The main question involved in this controversy is, whether a court of equity has the authority or jurisdiction to entertain an action brought for alimony alone, and to grant such alimony where no divorce or other relief is sought ?

It is true, beyond controversy, that the great weight and number of the English authorities deny such jurisdiction. And it is, perhaps, also true that the number and possibly the preponderance of the American authorities are in accord with the English. But there are well-considered cases and authorities of great weight which affirm the jurisdiction. Judge STORY says, of those latter, that "there is so much good sense and reason in the doctrine that it might be wished it were generally adopted." 2 Story's Eq. Jur., § 1423 *a*.

In England, formerly, the jurisdiction respecting alimony was exercised by the ecclesiastical courts, and the nature and purposes of those courts were foreign to that of granting mere pecuniary aid or relief. Such relief could only be granted there as an incident to other relief connected with the special matters within the cognizance of those tribunals. And hence alimony was not granted except in cases where a divorce either of *a vinculo* or *a mensa et thoro* was first sought for and obtained, and then it was granted as an incident and necessary in order to complete relief in respect of the principal matter of divorce, over which those courts had primary and plenary jurisdiction. It was very natural, theretofore, that when courts of equity came to exercise jurisdiction in divorce cases they should feel bound by the precedents, in such matters, which had been established by the ecclesiastical courts theretofore exercising that same jurisdiction. And this too seems to have been done without any consideration of the fact that the inherent powers of the two courts were essentially different. And it was

also equally natural that our American courts, exercising the English chancery jurisdiction, should look to and follow the precedents established by like courts in the mother country. In this way it is possible to account for the original current of authority, as above stated, and which we regard as contrary to the better reason and to principle.

That a husband is bound, both in law and equity, for the support and maintenance of his wife is a proposition hitherto and now undisputed. If by his conduct he makes it unsafe, or by entertaining others there he makes it immoral for her to remain at his home, she may leave it and him and carry with her his credit for her maintenance elsewhere. So that, in such case, a victualler, a merchant, a dressmaker, a milliner, a shoemaker, a laundress, a physician, a lawyer, or any dealer in the necessities of life may severally supply the wife with the articles needful and proper in her situation, and may respectively maintain their actions against the husband for their value. This remedy the law affords. But this involves multiplicity of suits; and besides, the remedy is by no means adequate. The wife may find it difficult, if not impossible, to obtain a continuous support in this way, since such dealers and professional men would be unwilling to supply their articles or services, if thus compelled to resort to litigation in order to secure their pay. Here then is a plain legal duty of the husband for the violation of which no adequate remedy, even with a multiplicity of suits, can be had, except in a court of equity. Upon the ground of avoiding a multiplicity of suits, or on the ground that no adequate remedy can be had at law, a court of equity may properly base its jurisdiction in such cases.

And, under our law, we do not see, since the husband owes this obligation of maintenance to the wife, as well as to the public, why she may not, independent of any other ground, maintain this action against him. For it was held by this court, in *Jones v. Jones*, 19 Iowa, 236, that a wife who has abandoned her husband for cause, or been by him driven from his home without cause, may maintain an action of replevin against him in her own name, to recover a bureau, table and other articles of household furniture, owned by her at the time of the marriage, and taken by her into the family and there used for eight years or more during their co-habitation. This case establishes the right of the wife under our law to maintain an action in her own name against her husband for the enforce-

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ment of her proper rights. The question here involved has never been before, or decided by, this court. In one or more cases the common-law rule denying the right of the wife to maintain such an action has been referred to, or stated in argument; as in *O'Hagan v. O'Hagan*, 4 Iowa, 509 (*i. e.* 516, 517); *McMullen v. McMullen*, 10 *id.* 412. Of course it is necessary that she shall establish not only the fact of separation, but also that such fact rightfully and properly exists, by reason of the wrongful conduct of the husband, and without fault on her part, this wrongful conduct of the husband may be such as would (as in this case) form a sufficient ground for her divorce; yet an affectionate, devoted and hopeful wife may still not desire a divorce, by reason of her belief that she may reclaim him, and make him worthy of her love, notwithstanding his fall. But, during the period of her forbearance and efforts at reclamation, she is entitled to and must have her maintenance. It seems to us, that upon well-settled equity principles, as well as upon considerations of public policy, the action may be maintained without asking a divorce or other relief. See *Galland v. Galland*, 38 Cal. 265, and cases cited.

Upon the facts proven in this case, it is manifest that the husband has been guilty of the highest crime he could commit against his wife — that of adultery; and also, that the wife is without fault. Her reputation is abundantly justified. The alleged decree for divorce, obtained by the husband, was without any notice to the wife, in a county wherein neither party ever resided, and for an alleged cause wholly fraudulent and false; it is therefore void. The allowance of \$25 per month as alimony is certainly not unreasonable; nor is the allowance for an attorney's fee shown to be excessive or improper. But in the absence of all showing that any obligations or indebtedness have been incurred by the wife, or that any claims are outstanding on account of her maintenance prior to the commencement of this action, and in view of all the facts in this case, we are not prepared to allow any thing for maintenance prior to the commencement of this suit. The judgment of the District Court will, therefore, be so modified as to reject the claim for past maintenance, and make the monthly allowance begin with the date of the suit, March 20, 1871, and in all other respects will be

*Affirmed.*

**STATE v. MCKEAN, appellant.**

(36 Iowa. 242.)

*Criminal law—when a detective is not an accomplice*

One who enters into communication with criminals and assists them in perpetrating a crime, without any felonious intent, but solely for the purpose of discovering and making known their crimes and disclosing them for the benefit of the public, is not to be regarded as an accomplice, even though he be not an officer of the law, or charged with any public duty to detect offenders.

INDICTMENT of McKean for grand larceny in stealing horses. Upon the trial he was found guilty and sentenced. The opinion states the case.

*J. N. Cornish and A. R. Anderson, for appellant.*

*M. E. Cutts, attorney-general, for the State.*

COLE, J. Upon the trial of the defendant there were but three witnesses introduced. The first, Meeks, testified that he was told by a third person, whose name he gives, that such person and the defendant wanted him to go into horse-stealing business with them; that he agreed to do so, and then told certain other persons of it; these persons said to him to go ahead and they would pay him well if he would go on and detect the men; he said he was a detective and would do it. This witness then states the circumstances of the larceny, the defendant being present, and where the horses were sold by him, the defendant not being present or receiving any of the proceeds, except for the saddles, which were his; a part of the proceeds were paid over to others of the company. The next witness testifies that he was one of the committee that employed the witness who had just testified, and agreed to pay him well for it, and that the witness had told them what he would do, and had afterward detailed the facts to the committee just as he had now testified. The last witness was the owner of one of the horses stolen, had missed him and afterward found him in Kansas, just as the witness first testifying had told him.

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The court gave to the jury, among other instructions, the following: "8th. If you find from the evidence that the witness Meeks went into an arrangement with the defendant and others to steal the horse in question, and did assist in taking said horse, whether or not he is an accomplice in the crime, if any has been committed, will depend whether, at the time he took the horse, he took it with felonious intent, that is, with the intent to appropriate the horse to his own use and to deprive the owner of the use thereof. 9th. If at the time of the taking he was actuated by, or possessed of, such felonious intent, he is then to be regarded as an accomplice; but on the other hand, if you are satisfied from the evidence that Meeks intended from the beginning to act the part of a detective to ferret out and make known the crime and secret frauds of the defendant and others, then he is not to be regarded as an accomplice. This question of whether Meeks was an accomplice or a detective is important, and must be by you determined, in view of the next instruction which I shall give you. It is a question of fact which you are to determine from the evidence. 10th. If you find, under the instructions given above, that the witness Meeks was an accomplice, the laws of this State direct that a conviction cannot be had upon the testimony of an accomplice alone, unless such testimony is corroborated by such other testimony as shall tend to connect the defendant with the commission of the offense, and the corroboration is not sufficient if it merely shows the commission of the offense, or the circumstances thereof. But this rule of evidence does not apply if you find that Meeks was not an accomplice, but a detective."

The precise point of objection to these instructions, as we understand it, is, that the court did not instruct that the witness Meeks was an accomplice; as a matter of law, whether he was acting feloniously or as a detective.

The authorities upon this question are few; indeed there is but one case we have found in which the point was directly ruled. That case is *Rex v. Despard*, 28 Howell's St. Trials, 346 (*i. e.*, 498). The defendant was tried before Lord ELLENBOROUGH, Baron THOMSON and Justices LA BLANC and CHAMBER for high treason, the trial occurred in February, 1803 (43 Geo. III). On the trial, one Thomas Windsor testified that he had received from one of the defendant's associates some printed cards, which were received and sworn to by the adherents by reading the affidavit on it and kissing it; that he

had done so, and had delivered one to Mr. Bownas, an army agent, from whom he received advice as to the conduct he should hold with the persons in the conspiracy, and that he followed such advice. His testimony was very important and full. Mr. Bownas testified that he received the card from Windsor, and gave him advice and directions how to act. After the testimony was closed and the arguments of counsel concluded, Lord ELLENBOROUGH, in the course of a most elaborate and extended "summing up," and just after speaking of accomplices, used the following language: "But there is another class of persons which cannot properly be considered as coming within the description, or as partaking of the criminal contamination of accomplices; I mean persons entering into communication with the conspirators, with an original purpose of discovering their secret designs, and disclosing them for the benefit of the public. The existence of such original purpose on their part is best evinced by a conduct which precludes them from ever wavering in, or swerving from, the discharge of their duty, if they might otherwise be disposed so to do; as in the case of Windsor, who bound himself to his duty by an early communication to Bownas, and received from him directions as to the steps which he should afterward pursue, if he entered into and continued in the apparent prosecution of the purposes of the conspiracy; with this view and object he is not an accomplice, although, perhaps, a great degree of objection or disfavor may attach to him on other grounds, for certainly no person of very delicate feelings (however necessary it may be in some cases) would choose to go on from day to day, apparently forwarding the purposes of a conspiracy, in order that he might afterward disclose it and bring the parties concerned in it to justice; but still, whatever may be the merit or demerit of this species of conduct on other grounds, it is not, taking the fact as Windsor has stated it, the case of an accomplice."

In the text-books on evidence, we find either literal extracts from this charge of Lord ELLENBOROUGH, as in vol. 1, Phil. on Ev., § 3, ch. 6, p. 118 (vol. 3, 4th Am. ed., 1859); or a statement of the rule in substantially his language, as in vol. 1, Greenl. on Ev., § 383. The case of *Rex v. Despard* is the case referred to by all text-writers. In the case of *Commonwealth v. Downing*, 4 Gray, 29, which was a prosecution for the unlawful sale of intoxicating liquor, and where the witness testified to facts constituting the offense, and that he bought the liquor for the express purpose of prosecuting the

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defendant for the sale, the defendant asked the court to instruct the jury, as matter of law, "that a witness who would come into court and testify that he had purchased and procured another person to commit a crime, for the purpose of prosecuting the person so hired and procured to offend, was not a credible witness, and the jury ought not to found a conviction upon such testimony." This was refused, and the court instructed that "it would be competent for them to convict the defendant upon this testimony if they believed it to be true, and if they further believed that the allegations of the complaint had been proved beyond a reasonable doubt; that it sometimes became necessary, in order to detect offenders, to match cunning with cunning, and accomplish by artifice what could not otherwise be consummated; and mentioned as familiar examples the efforts made to detect horse thieves, counterfeiters, incendiaries, and the like." The defendant was found guilty, and on appeal the Supreme Court held that "the witness was not an accomplice." This point was settled in *Commonwealth v. Williard*, 22 Pick. 476. The comments of the presiding judge upon the weight to be given to testimony are not matter of legal exceptions. But we do not wish to be understood as expressing any concurrence with the remarks of the presiding judge. We think he might well have instructed the jury that such testimony was to be received with the greatest caution and distrust.

In the case under consideration, the persons to whom the witness made the communications of his purpose to act the detective were not officers of law, or charged with any public duty to detect offenders. In this respect the case differs from *Rex v. Despard*, *supra*. But this difference, perhaps, under our form of government and *regime*, would not be sufficient to defeat the application of the rule. The court left the credibility of the witness and the weight to be given to his testimony entirely to the consideration of the jury. Of these they were the proper judges. We do not see how we can interfere with the action of either the court or jury.

After the jury returned their verdict, a motion was made to set it aside, on the ground that, after the jury retired to their room, one of their number separated himself and went to a saloon and bought intoxicating liquor, and took it to the jury room, where he and others drank of it. The affidavits of five witnesses were produced that, as they severally believed, they saw the juror go after the liquor. One juror, and the bailiff in charge of the jury, file

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affidavits positively denying any separation of the juror from the others, and also denying as positively that any intoxicating liquor was drank, or in the jury room. These are all the affidavits. The affidavit of the alleged absenting juror was not taken. These affidavits present a question of fact, upon which the court below found against the defendant. We cannot properly interfere with that finding; if it is not in accord with the weight of the testimony contained in the affidavits, it surely is not so manifestly against it as to justify our reversal.

*Affirmed.*

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CAREY v. BAUGHN.

(36 Iowa, 540.)

*Will — revocation — republication, evidence of.*

A will was revoked by the subsequent birth of a child. *Held*, that republication could not be proved by parol evidence.

ACTION to recover possession of a lot of land in Council Bluffs.

The defendant claims that he owns the said lot in fee-simple.

The respective titles of the parties are derived as follows :

On the 2d of June, 1849, Stephen T. Carey duly executed his will, bequeathing all his estate, both real and personal, to his wife Martha E. Cary. Afterward he became the owner of the lot in controversy. The plaintiff, Ida P. Carey, is the only child of Stephen and Martha E. Carey, and was born after the execution of the will, to wit, March 25, 1851. Stephen T. Carey died at Council Bluffs on the 10th day of March, 1855. Afterward, his widow, Martha E., intermarried with Cornelius Eubank, and they conveyed the property in dispute to Asenath Street, under whom the defendant claims title to the property.

The plaintiff claims it as the heir of Stephen T. Carey. The defendant introduced, as a witness, Dr. P. J. McMahon, who, against the objection of plaintiff, was permitted to testify substantially as follows :

“About ten days or two weeks before the death of Stephen T. Carey, I had a conversation with him in the presence of his wife



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and daughter. I informed him that death was imminent, and suggested the propriety of his making a will, inasmuch as he had considerable property. He said he had made a will before he left Indiana, willing all his property to his wife. I then suggested that his wife was young, and that he had better make some provision for his child. He said the child was also his wife's, and that she would provide for it, and that he would leave it as he had left it by his will that he had made in Indiana.

The testimony of Cornelius Voorhis was also introduced substantially to the same effect.

The plaintiff objected to all of this testimony as incompetent, and that the republication of a will cannot be shown by parol, which objection the court overruled, and the plaintiff excepted.

The plaintiff asked the court to instruct the jury that "a will cannot be republished by oral declarations of the testator, and a republication of it cannot be established by parol." The court refused to give this instruction, and submitted to the jury the question whether a republication was shown by the evidence.

The jury returned a verdict for defendant. Plaintiff appeals.

*Robert Percival*, for appellant.

*Ross & Dailey*, for appellee.

DAY, J. Numerous errors have been assigned and argued, but one only requires consideration from us.

It is conceded here, and was upon the trial below, that the birth of Ida P. Carey, the plaintiff, worked an implied revocation of the will of Stephen T. Carey, previously executed. *McCullen v. McKenzie*, 26 Iowa, 511. The question is, whether this revocation, which the law implies, may be rebutted, or removed by proof of a parol republication.

In *Jack v. Shoenberger*, 22 Penn. St., cited by appellee, the testator made his will in 1828, with a residuary clause. The question was, whether a parol republication of the will was effective to pass to the residuary legatee property acquired after the date of the execution of the will. It was held that a parol republication would have that effect; but the decision was based upon the ground that the original publication might be proved by parol. The court used the following language: "Notwithstanding the sixth section of the act of 1705, republication of a written will might, under

that act, be proved by parol, so as to pass real estate acquired subsequently to the date of the will. Subscribing witnesses to the execution of the will were not required, and as publication might be proved by parol so might republication, for the rule was that the same solemnities, but no more, were required, to republish as to publish it. *Harvard v. Davis*, 2 Binn. 415; *Jones v. Harley*, 2 Whart. 103. And such was the law in England until the sixth section of the act of 29 Charles II cut off parol republication, but this statute was never extended to Pennsylvania."

The case is no authority for the position of appellee, because, when the will then under consideration was executed, subscribing witnesses to the execution of a will were not required in Pennsylvania, whereas when the will now under consideration was executed, a will was of no validity unless attested and subscribed in the presence of the testator by two or more competent witnesses. Rev. Stat. of 1849, p. 667, § 5. Besides, this opinion recognizes the doctrine that the same solemnities are requisite to the republication, as to the publication, of a will, which amounts to a denial of the right to republish by parol, in all cases where the publication must be attested by subscribing witnesses.

The case of *Card v. Grinman*, also cited by appellee, is one respecting the evidence necessary to the revocation of a will, and has no reference to the steps necessary to republish a will once revoked. In this case the heirs sought to prove, by parol, that the testator declared the will not to be his will, and ordered it to be destroyed; and that the devisees named therein took it out of his possession and induced him to believe that they had destroyed it, for the purpose of establishing it after his death, contrary to his mind and will. Upon appeal it was held that this evidence should have been admitted, and a new trial was granted. See *Card v. Grinman*, 5 Conn. 164. The note of the editors of *American Leading Cases* to *Lawson v. Morrison*, 2 Am. Lead. Cas. 674-676, is also cited by appellee. In this note it is said that where a will is not physically destroyed it may be restored by a republication, and that for this purpose any act or expression, which showed an intention to treat the will as a valid and subsisting instrument, was sufficient at common law, and that in the States of this country where no statutory provision has been enacted upon the subject, the question of republication stands as at common law. The review, however of the authorities cited to sustain this position shows that

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something more than a mere parol declaration of intention to regard the will as existing is regarded by most of them as necessary. The editors say that in *Witter v. Mott*, 4 Conn. 77, the subject seems to have been misapprehended, and it was held that a will revoked by writing could not be republished by a mere verbal declaration. But they say that in *Card v. Grinman*, 5 Conn. 464, this error was corrected, and *Witter v. Mott* virtually overruled. But *Card v. Grinman* only holds, as we have before seen, that evidence of certain acts of the testator and of fraudulent acts of the devisees should have been admitted, for the purpose of showing a revocation.

They also cite in support of their position *Harvard v. Davis*, 2 Binn. 406, and *Jones v. Hartley*, 2 Whart. 103. But they admit that it was asserted by YATES, J., in *Harvard v. Davis*, and repeated by SERGEANT, J., in delivering the opinion of the court in *Jones v. Hartley*, that the republication of a will must be attended by the solemnities necessary for its original publication, and, in the latter case, this was held to involve that both must be proved by two witnesses.

The only remaining case cited by the learned editors is *Jackson v. Potter*, 9 Johns. 312, in which they say the Supreme Court of New York went still further, and held that the act then in force in that State, which provided that no will should be revoked or altered, unless in writing, rendered a writing necessary for a republication, although obviously neither a revocation nor an alteration. These citations are so far from sustaining the position assumed, that they seem to us to support the opposite conclusion. It is quite clear that it is not settled that a will, to the due execution and original publication of which subscribing witnesses are necessary, can, after revocation, be republished by parol. The doctrine deducible from the authorities seems to be, that, in the absence of statutory provisions upon the subject, the same formalities are necessary to the republication of a will as are required for the original publication. And this rule commends itself to us as one eminently beneficial and just. In *Witter v. Mott*, 2 Conn. 67, it is said that when a will has been revoked in due form, by a written declaration, it cannot be set up or republished by parol. See Redfield on Wills, 374, and cases cited; *Jackson v. Rogers*, 9 Johns. 311. In our opinion the court erred in admitting the evidence complained of, and in refusing to give the instruction asked.

*Reversed.*

**FITZPATRICK V. FITZPATRICK.**

(28 Iowa, 674.)

*Will — misdescription in — parol evidence to prove.*

Devise of the "west half of the north-east quarter of section 23," in T. township. *Held*, that parol evidence was inadmissible to show that testator owned the east half of the south-west quarter of section 23, and no other land, and that the draughtsman of the will had erred in putting the one description for the other. (*See note*, p. 549.)

ACTION to quiet the title to certain real estate which the plaintiff claims under the last will and testament of his mother, Ellen Fitzpatrick, deceased. The District Court sustained a demurrer to the petition, and the plaintiff appeals. The further facts appear in the opinion.

*Smith, Fouke & Chapin*, for appellant.

*Wilson & O'Donnell*, for appellees.

MILLER, J. It is stated in the petition that Ellen Fitzpatrick died about the 4th day of July, 1861, leaving, surviving her, Edward Fitzpatrick, her husband, and A. E. Fitzpatrick, Ellen Fitzpatrick, Edward Fitzpatrick, Jr., and the plaintiff, her heirs at law. That prior to her death the deceased made her last will and testament, as follows :

"In the name of God, amen! I, Ellen Fitzpatrick, of the Township of Table Mound, in the county of Dubuque, and State of Iowa, of the age of thirty-seven years, and being of sound mind, do make, publish and declare this my last will and testament in manner following, that is to say: First, I devise to my son John Fitzpatrick, his heirs and assigns, that tract of land situated in Table Mound Township, Dubuque county, Iowa, described as follows: The west half of the north-east quarter of section 23, in Table Mound Township, Dubuque county, Iowa, on the following conditions: That the said John Fitzpatrick shall not squander or make away foolishly with said premises. In case of his making

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away as above, then I devise it to the use of my children, share and share alike. Second, I devise to my daughters, A. E. Fitzpatrick and Ellen Fitzpatrick, my bed and bedding, share and share alike, and lastly, I bequeath to my son, Edward Fitzpatrick, the sum of one dollar. Last of all I hereby appoint Thomas Burk the sole executor of my last will. In witness whereof, I have hereunto set my hand this 20th day of June, in the year of our Lord one thousand eight hundred and sixty-one."

(Duly signed, sealed and witnessed.)

It is alleged that this will was duly proved and admitted to probate on the 8th of January, 1872, and plaintiff appointed executor.

It is further averred that the testatrix never owned or claimed to own the land described in the will; that she did own at the time of making the will, and up to the time of her death, 80 acres of land properly described as the east half of the south-west quarter of section 23, in township 88 north, of range 2 east, of the 5th P. M., and that she was seized of no other property and claimed to own no other; that the person who reduced the will to writing, at the time the testatrix declared the same, made a mistake in writing the description of the land intended to be devised by the testatrix.

The petition asks that a decree be made reforming and correcting the will; that it may be adjudged that the real estate last described was the real estate intended by the testatrix to be devised to the plaintiff; that the will may be corrected so as to describe the same, and that plaintiff's title thereto be quieted, and for general relief.

Upon the question raised by the demurrer, as to the extent courts may go in receiving extrinsic evidence in aid of the construction of wills, the cases are quite numerous. It has been truly said, "there is no end of citing cases upon this general question." And while there is to be found, among the vast number of cases, some real and apparent conflict, yet the greater number of them are in general accord.

In *Cheney's Case*, 5 Coke, it was said by Lord COKE that, "in a devise of land by writing, an averment out of the will should not be received. For a will concerning land ought to be in writing, and not by any averment of the same; otherwise it were great inconvenience that not any may know by the written words of the will what construction to make, if it might be controlled by collateral averment out of the will." In *Redfield on Wills* (3d ed.), vol. 1, pp.

497, 498, the author says: "This contains, in brief, the substance of the rule, and the reason for it. The same rule is almost universally recognized in the English courts, from the earliest times forward."

In *Newburgh v. Newburgh*, 5 Madd. Ch. 223, the Earl of Newburgh, having estates in the counties of Sussex, Gloucester, and elsewhere, gave instructions to his solicitor to prepare a will, which *inter alia* was to give to his wife, the Countess of Newburgh, an estate for life in his estates in the counties of Sussex and Gloucester. The solicitor prepared a will accordingly, and the same was afterward laid before an eminent conveyancer to settle. By some accident the word "Gloucester" was left out by the conveyancer, and the person who made the fair copy changed the word "counties" into "county," and the will, as copied, omitted, therefore, altogether the estate for life to the countess dowager in the county of "Gloucester."

At the time Lord Newburgh executed the will, the solicitor who attended the execution had with him the abstract of the will as originally prepared, and the will was not itself read, but this abstract, which gave a life estate to lady Newburgh as well in "Gloucester" as in "Sussex," and the testator executed the will believing it followed the abstract. A bill was filed by the countess dowager to rectify the mistake, and that the trusts of the will be executed with such correction.

The vice-chancellor refused to correct the mistake, holding that the court could not set up the intention of the testator which, by mistake, he had been prevented from carrying into execution, as if he had actually executed that intention in the forms prescribed by the statute of frauds. "To assume such a jurisdiction," says the vice-chancellor, "would, in effect, be to repeal the statute of frauds in all cases where a deviser failed to comply with the statute by mistake or accident, and to operate this repeal, by admitting parol evidence of the intention of the deviser, which it was the very object of the statute to avoid."

In *Langston v. Langston*, 8 Bligh (N. S.), 167, the alleged mistake in the will was by the omission of a line in copying, and it was held that parol evidence of such mistake was wholly inadmissible.

These cases and others are cited by Judge REDFIELD in support of the statement in the text of his work on wills, that "it seems perfectly agreed that parol evidence is not admissible to supply any

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omission or defect in a will, which may have occurred through mistake or inadvertence." See Redf. on Wills, vol. 1 (3d ed.), p. 497, § 5. The same doctrine is also stated in 1 Story's Eq. Jur., § 179, in these words: "Parol evidence or evidence *dehors* the will is not admissible to vary or control the terms of the will; altogether it is admissible to remove a latent ambiguity." See cases there cited in note 2 to that section.

In *Hiscocks v. Hiscocks*, 5 Mees. & Wels. 362, the testator devised lands to his son John H., for life; and on his decease, to the testator's grandson John H., eldest son of said John H., for life; and on his death to the first son of the body of his said grandson John H., in tale-male, with other remainders over. At the time of making the will the testator's son John H. had been twice married; by his first wife he had one son, Simon; by his second wife, an eldest son, John, and other younger children, sons and daughters. After a review of the earlier cases the court held that evidence of the instructions given by the testator for his will and of his declarations was not admissible to show which of these two grandsons was intended by the description in the will; and it was suggested whether the devise was not void for uncertainty. The court in that case approve the rule as stated by TINDAL, C. J., in *Miller v. Travers*, 8 Bing. 244, that, "in all cases where a difficulty arises in applying the *words* of a will or deed to a devise or grant, the difficulty or ambiguity which is introduced by the admission of extrinsic evidence may be rebutted or removed by the production of further evidence on the same subject, calculated to explain what was the estate or subject-matter really intended to be granted or devised." See, also, *Gords v. Needs*, 2 Mees. & Wels. 129.

In *Watson's Lessee v. White*, 5 Md. 297, the testator, by one clause of his will, devised "all my land which lies on the south side of the country road leading to, etc., called 'Parsons' Outlet,' or by whatsoever name or names the same may be known or called, except so much of said land as lies on the south side of 'Beaver Dam Branch'" and by another clause he devised, "All the lands I own on the south side of Beaver Dam Branch," etc. It was held that extrinsic evidence was admissible to show the location of the land and of the branch, but not to show what was the *intention* of the testator in the use of the words, "Beaver Dam Branch;" that where a given subject is devised, and there are two pieces of property, the one technically and precisely corresponding to the description in the

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devise, and the other not so completely answering thereto, the latter will be excluded; and that where the language of the will is plain and unambiguous it must govern, and no extrinsic evidence is admissible to show that the testator *meant* something different from what his language imports.

In *Judy v. Williams*, 2 Ind. 449, the plaintiff claimed as a devisee under a will made by one John F. Judy. The testator, after bequeathing a lot of land to a grandson, and certain bonds and accounts to his son Isaac, devised all the *rest and residue* of his real and personal property, "to all the rest of my children, to be equally divided among them, namely: Mary, Drusilla, Deborah, John, Ann and Reason." It appeared that two of the devisees, viz.: Drusilla and John, died several years before the testator, leaving issue; and the defendants were permitted in the court below to prove certain conversations of the testator after the death of Drusilla and John, to show that the testator's intention, in naming them in his will, was to devise the legacies there devised in their names to their children. It was held that proof that, by a devise to a parent, the testator *meant* a devise to the children of such parent, even although the parent was known to the testator to be dead at the time the will was made, was inadmissible.

It was there said that "courts will always endeavor to give effect to the intention of the testator, if possible; but that intention must in some way be manifested in the will itself. It cannot be gathered wholly *dehors* the will." And it was further held to be necessary that every one claiming in the character of a devisee should answer the description which the deviser has given him in the will.

In *Mann v. Executors of Mann*, 1 Johns. Ch. 231, Chancellor KENT states the question before the court to be, "whether, under the bequest of 'all the rest, residue and remainder of the *moneys* belonging to my estate at the time of my decease,' the widow is entitled to any thing more than the cash which the testator left at his death; or whether, as the defendants have contended, she be entitled also to the bonds, mortgages and notes." And "this question," says the chancellor, "has led to another, and that is, whether the parol evidence offered be admissible to explain the testator's meaning?"

"It is a well-settled rule of law," he says, "that seems not to stand in need of much proof or illustration, for it runs through all the books from *Cheney's Case*, 5 Coke, 68, down to this day, that parol



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evidence cannot be admitted to supply or contradict, enlarge or vary, the words of a will, nor to explain the intention of the testator, except in two specified cases: First, when there is a latent ambiguity arising *dehors* the will, as to the person or subject meant 'o be described; and second, to rebut a resulting trust. All the cases profess to proceed on one or the other of these grounds." See case cited in opinion of the chancellor.

The chancellor says further, that "perhaps a solitary dictum may occasionally be met with (for there are volumes of cases on the subject of wills) in favor of the admission of parol proof to explain an ambiguity or uncertainty appearing on the face of the will, though Lord THURLOW says there is no such case. If there be, we may venture to say it is no authority. If a will be uncertain or unintelligible on its face, it is as if no will had been made." It was held in that case that parol evidence was not competent to show that by the term "moneys" the testator intended to include bonds, mortgages and notes, or any thing more than "cash," that being the import of the word used.

In *Skipworth v. Cabell's Exr's*, 19 Gratt. (Va.) 758, it was held that parol evidence was not admissible to show the views or opinions of the testatrix, in order to show that she acted under a mistake in the revocation of certain clauses in her will.

To quote further from Chancellor KENT in *Mann v. Mann*, *supra*: "If there be a mistake in the name of the legatee, or there be two legatees of the same name, or if the testator bequeath a particular chattel, or there be two or more of the same description, or if, from any other misdescription of the estate or of the person, there arises a latent ambiguity, it may and must be explained by parol proof, or the will would fall to the ground for uncertainty. When a latent ambiguity is produced, according to the language of the courts (Lord THURLOW in 1 Ves. Jr. 259, 260, 415, and Lord KENYON in 7 Term R. 148), in the only way in which it can be produced, viz., by parol proof, it must be dissolved in the same way; and there is no case for admitting parol evidence to show the intention upon a patent ambiguity on the face of the will. They are all cases of latent ambiguity. \* \* \* And if collateral averments be admitted, to use the words of Sir MATHEW HALE in *Fry and wife v. Porter*, 1 Mod. 310, how can there be any certainty? a will may be any thing, every thing, nothing. The statute appointed the will to be in writing, to make a certainty, and shall

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we admit collateral averments and proofs to make it utterly uncertain? In a still later case, 3 P. Wms. 354, Lord TALBOT observed that if we admit parol proof, then the witnesses, and not the testator, would make the will; and he spoke with equal decision in the case of *Brown v. Selwyn*, Cases Temp. Talbot, 240, though the parol proof in that case would have left no doubt of the intention of the testator being contrary to the legal operation of the will. This "case," says the chancellor, "comes with the more weight, since the decree was affirmed in the House of Lords (4 Bro. P. C. 179), who would not suffer the parol evidence to be read, nor even the answer as to that matter."

In *Humphreys v. Roberts*, 5 Barn. & Ald. 507, A., by his will, devised all his messuage or dwelling-house, with the appurtenances, in High street in the town of H., and all and every his buildings and hereditaments in the same street, to his mother for life, and after her death to C. D. The testator had only one house in High street, but behind that house he had two cottages fronting a lane called Bakehouse lane; there was no thoroughfare through that lane, the only entrance into it being from High street. It was held that the description of the will could only be satisfied by holding that the cottages passed by the will.

In *Pritchard v. Hicks*, 1 Johns. Ch. 270, it was held that where the subject of the devise or legacy is described with reference to some extrinsic fact, extrinsic evidence may be resorted to to ascertain that fact; and where the *words* of the will are equally applicable to two persons or two things, parol evidence is admissible to show which person or thing was intended.

In *Connolly v. Pardon*, 1 Johns. Ch. 291, the will, after several legacies, devised as follows: "*Thirdly*, I bequeath to my brother Cormac Connolly, and to my two sisters, Mary and Ann, whatever remains of my money, after the above bequests, to be divided between them share and share alike; and in case of the demise of either of them, to share and share alike to the survivor or survivors." On the following day he made a codicil to his will, and among other bequests made the following: "To my nephew Cormac Connolly, son of my brother Cormac Connolly, the sum of \$500 for his ecclesiastical education, which sum is to be taken from what I have bequeathed to my brother Cormac and to my sisters Mary and Ann." The testator had no brother named Cormac, but he had a nephew Cormac, son of his brother James, who, at the time of making the

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will, was pursuing classical studies in Ireland, with a view to an ecclesiastical education, and he was the only nephew of that name. The only brother or sisters of the testator who survived him or left issue were the complainant, James Connolly, and the two sisters named in the will, unless another brother Henry, who left the family residence in Ireland unmarried thirty years since, and who had not been heard of by the family for many years, was then living. Upon these *facts* the chancellor was of opinion that there could be no doubt that the bequest was intended for James Connolly, mis-called Cormac in the will.

In *Winkley v. Kaime*, 32 N. H. 268, where the testator devised "thirty-six acres, more or less, in lot 37, in the second division in Barnstead, being the same I purchased of John Peavey," and there was no such lot as 37 in the second division, but there was a lot 97 in that division, a part of which the testator had purchased of John Peavey, and of which he died seized, it was held that the words "in lot 37" might be rejected as a false description, and lot 97 pass by the devise, "the principle being that, if there is a sufficient description of the land devised, independent of the erroneous description, the will will take effect." See cases there cited on p. 274.

In *Lessee of Allen v. Lyons*, 2 Wash. C. C. 475, the language of the will was that the testator devised his lot on *Third* street (Philadelphia), in the possession of R. H., to his daughter. It appeared that he had no lot on *Third* street, but that he had one on *Fourth* street, which was in possession of R. H. The court held this to be a latent ambiguity that could be explained by parol evidence of extrinsic *facts*, and directed the jury, if they were satisfied that the lot in *Fourth* street was the one intended, they should find for the plaintiff as to this point in the case.

The following are also cases of latent ambiguities where extrinsic evidence was admitted to show the application of the language of the will to the property devised, or to the person intended as the devisee: *Townsend v. Downer*, 23 Vt. 225; *Button v. American Tract Society*, id. 336; *Roman Catholic Asylum v. Emmons*, 3 Bradf. Sur. 144; *Myers v. Rigg*, 20 Mo.; *In re Gregory*, 11 Jur. (N. S.) 634.

These cases, and many more that could be cited, proceed upon the doctrine that, where a latent ambiguity is discovered, evidence of extrinsic *facts* may be admitted in aid of the exposition of the will, to determine whether the *words of the will*, with reference to the

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facts, admit of a plain application; and if not, then to determine whether the words can be applied in any other sense of which they are capable, so as to satisfy the intention of the testator. In all the cases coming within the scope of our investigation of this question, where extrinsic evidence has been admitted to remove a latent ambiguity, the language of the will, after rejecting the false description, has been sufficient to show *what property* or *what person* was intended by the testator. As in *Winkley v. Kaine, supra*, the "lot 37" being rejected as false, because there was no such lot, there remained a sufficient description by the words of the will to make it clear what lot was intended. The devisee described the property as "thirty-six acres more or less in second division of Barnstead, *'being the same I purchased of John Peavey.'*" This description, with the aid of the extrinsic evidence showing that the testator had purchased of John Peavey a part of lot 97 in the second division of Barnstead, of which he died seized, and that there was no lot 37 in the second division, rendered the intention of the testator certain in respect to the property devised. The same is true of *Allen v. Lyons, supra*, and of every case we have seen. If there is no person or no property corresponding to the description in *all particulars*, but there is one corresponding in many particulars, and no other that can be intended, the false description will be rejected, and the property corresponding to the description in other particulars is held to pass, or the person thus answering the description will take under the will. But we have seen no case where other words than the words of the devise have been allowed to be imported into the will in order to describe a devisee, or to identify property to which the words of description in the will did not apply, upon the principle above cited. And when, by rejecting the false description, the remaining words do not describe the property or person to any extent, parol proof to show the testator's intention is inadmissible.

In *Jackson v. Van Vechten*, 11 Johns. 201, the testator devised as follows: "I give and bequeath to my beloved wife for and during her widowhood, *the farm which I now occupy*, together with the whole of the crops of every description, which may be thereon at the time of my death," etc.

The farm in question was at the time the will was made, and also at the death of the testator, in the possession of one Salistury, under a lease for years. It was held that "the maxim *falsa demon-*

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*stratio* cannot be held in this case ; that by rejecting the words, "which I now occupy," the will would stand thus: "*I devise and bequeath unto my said wife during the widowhood the farm,*" and this, the court said, "would be senseless and unintelligible. Had the devise been of *my farm at Watervliet*, which I now occupy, there would have been some color for the application of the rule; for then, by striking out what is called false description, there would still be some certainty left," in the words, "my farm at Watervliet." It was held, therefore, that parol evidence of the instructions given by the testator to the attorney who drew the will was not admissible to show that the words, "which I now occupy," had been inserted in the will by mistake.

In all cases of this kind, where there is no sufficient description in the will independent of that which is false, the devise fails for uncertainty. See *Hiscocks v. Hiscocks*, *supra*.

When we come to apply the principles settled by the cases above cited to the case before us, it is manifest that the devise in the will of Ellen Fitzpatrick, under which plaintiff claims, cannot be aided by averment and extrinsic evidence of the testator's intention. It is alleged to be a case of mistake in the writing of the will, whereby a certain tract of land is described that did not belong to the testator, nor did she claim at any time to have an interest in the land described in the will. The description in the will is complete and perfect, describing a tract of land which answers perfectly the description. We are asked to disregard this description and hear parol evidence to show that the testator intended to describe another and different tract of land. Not that she intended another piece of land *by the use* of the words of the devise, but that she intended to use different words of description, and that, through the mistake of the person writing the will, the words intended were not inserted, but other and different language was used. If the false description be rejected, there are then no words left in the will to describe the premises claimed under it. If the testator had, in addition to the words of description used in the devise, also used further words of description, such as "*my* land in the possession of A," or "the land I purchased of B," or "which I purchased of the United States at the land office in Dubuque," or "which I entered with a military land warrant," or any other such designation, then the case would fall within the principle of the adjudicated cases on the subject, some of which we have cited. After rejecting the false

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description, there would remain enough of the descriptive words of the will to show what property the testator intended to devise. But the description is single, with nothing left after rejecting that which is erroneous.

The will describes "That tract of land situated in Table Mound Township, Dubuque county, Iowa, described as follows: the west half of the north-east quarter of section 23, in Table Mound Township, Dubuque county, Iowa." Now, how can this description be made to apply to the "East half of the south-west quarter of section 23, township 88 north, of range 2 east, of the 5th P. M.?" It is admitted that the former description does not apply to the land last described, and we are asked first to allow evidence of the intention of the testator as declared by her to the person who wrote the will; and second, to presume that the testator intended to devise land of which she was the owner, and not that to which she had no title, or in which she had no interest." The cases, as we have seen, are abundant to the effect that extrinsic evidence of the testator's declared intentions cannot be admitted to correct a mistake in writing the will. And we have found no case which will justify a court in presuming, upon the mere fact of a bequest, that the testator intended to assert his ownership of the thing bequeathed, and that such assertion should be considered as implied and taken as part of the description of the property devised. The cases of *Hiscocks v. Hiscocks*, *supra*, and *Miller v. Travers*, *supra*, rest on doctrine directly opposed to this view. There the testator devised real estate in the county of "Limerick," where he owned none, and the court refused to admit evidence that he intended to devise his lands in the county of Clare, to which he had title. *Miller v. Travers*, 8 Bing. 244. This case is directly in point, for if parol evidence may be admitted to show that by the words "west half of the north-east quarter," lands which she did not own, the testatrix intended to devise the "east half of the south-west quarter," which she did own, upon the same principle a devise of land in the county of "Limerick" could be shown to be intended to apply to lands in the county of Clare. But the court decided otherwise.

We find a case exactly similar to the one before us, which has been recently decided by the Supreme Court of Illinois. *Kurtz v. Hibner*. 55 Ill. 514; S. C., 8 Am. Rep. 665. The mistake there was that the land was described as in "section thirty-two" instead of "section thirty-three." In the former section the testator did

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not own land. It was held that parol evidence was not admissible to show that the testator intended to devise land in a different section than that mentioned in the will, and that the draftsman of the will by mistake inserted the wrong numbers. That is precisely what the plaintiff seeks to do in this case.

In addition to cases already cited, see *Crocker v. Crocker*, 11 Pick. 252; *McAlester v. Butterfield*, 31 Ind. 25; *Jackson v. Still*, 11 Johns. 212; *Jackson v. Wilkinson*, 17 id. 146; *Lippen v. Eldred*, 2 Barb. 130; *McClure v. Beavans*, 29 Beav. 422. See, also, 1 Story's Eq. Jur., §§ 179, 180, 181, and cases cited in notes; 1 Redf. on Wills (3d ed.), 479-507, and cases cited; 1 Greenl. on Ev., §§ 289, 290.

The judgment of the District Court will be

*Affirmed.*

NOTE. — See the note to *Kurtz v. Hübner*, 8 Am. Rep. 669, wherein the authorities are reviewed at length. Judge REDFIELD expressly dissents from the doctrine of that case in *Redf. Cases on Wills*, 542. — REP

CASES  
IN THE  
SUPREME JUDICIAL COURT  
OF  
MAINE.

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BRYANT V. PENNELL.

(51 Me. 108.)

*Accession—product of mortgaged property.*

**Plants and shrubs, the growth of cuttings from plants and shrubs mortgaged pass to the mortgagee by accession.**

**ACTION** of trespass against William L. Pennell, a deputy sheriff, for negligent injury to certain plants attached by him upon a writ in favor of one Sparrow. Sparrow had a mortgage on a part of the plants and shrubs in plaintiff's green-house, and one Deering had a mortgage upon another portion of the same property. The defendant attached only "so much of the stock of plants and shrubs as were not covered by the mortgages."

The defendant contended that the growth from cuttings from the mortgaged property belonged to the mortgagees, but the justice instructed the jury that the plants and shrubs raised by the plaintiff from cuttings from the original mortgaged property belonged to the plaintiff.

The defendant excepted.

*Butler & Fessenden*, in support of exceptions.

*A. A. Strout & M. P. Frank*, for plaintiff.



APPLETON, C. J. On May 25, 1865, William Sparrow leased certain premises for the term of ten years to the plaintiff. In the lease it was agreed that the lessee was "to have permission at the end of his term to remove all buildings erected by him upon the premises, and also all plants, shrubs and trees set and planted by him for the purposes of his business as nursery-man and florist."

On the 16th June, 1869, the plaintiff mortgaged to said Sparrow "the green-house and shed attached, the whole adjoining the green-house now occupied by me under a lease from said Sparrow; also, a new propagating house about 10 feet by 90, situate in front of the above-mentioned green-houses, and all other glass and frame structures and out-buildings belonging to the said Bryant, situate upon the ground held under said lease; together with all the stock of Elmwood nursery, consisting principally of plants, shrubs and trees, and all the tools, implements and materials belonging to said nursery."

By virtue of his mortgage, Sparrow acquired a title to the property mortgaged. The plants and trees were included in it. The cuttings are from the plants. The portions severed, before severance, were subject to the mortgage. They are none the less so after severance. The mortgagee loses no rights, because, after severance, they remained in the same green-house in a condition for further growth and development.

This view is in accordance with all the analogies of the law. The hirer of sheep or cattle for a limited period is entitled to the increase of the flock during the term. The increase belongs to the usufructuary. But the mortgagor is not the usufructuary. As between the mortgagor and the mortgagee the title of the mortgagee is the better title. *Allen v. Delano*, 55 Me. 113. Where the mortgagor in January mortgaged "all the hay and grain of every kind that grows on the farm on which I now live the present year," it was held that the rye and rye-straw from the sowing of the fall previous belonged to the mortgagee. *Cadworth v. Scott*, 41 N. H. 456. A mortgage of leather cut and prepared for the manufacture of shoes covers shoes subsequently made from it by the mortgagor. *Putnam v. Cushing*, 10 Gray, 334. In the opinion of the court, "the property still remained in the mortgagee, notwithstanding the change by the completion of the work as originally designated; the materials being cut and prepared therefor before the mortgage. It was not the case of a new acquisition of articles of property not

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held by the mortgagor at the time of making the mortgage; but merely of labor performed upon materials and stock of the plaintiff, acquired by his mortgage. In such case the accession will pass to the mortgagee."

The ruling, therefore, that the plants and shrubs, raised by Bryant in the green-house from cuttings made by him from the original plants and shrubs included in the mortgage, were not covered by the mortgage, and that no title thereto passed to the mortgagee, was erroneous.

WALTON, DICKERSON, BARROWS, DANFORTH and VIRGIN, JJ., concurred. .

*Exceptions sustained.*

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## STATE V. GRAND TRUNK RAILWAY.

(61 Me. 114.)

*Railroad — indictment for causing death.*

A statute imposed a penalty upon railroads by whose negligence the life of a person is lost, to be recovered by indictment to the use of the heirs of the deceased. *Held*, that to bring a case within the statute death must be instantaneous.

INDICTMENT against defendant corporation for negligently causing the death of one Pullen. The statute under which the indictment was found declared in effect that when the life of a person is lost through the carelessness of a railroad corporation or its servants, compensation shall be made to the heirs of the deceased to be recovered by indictment. R. S., chap. 51, § 36.

A verdict was rendered against the company and a motion for a new trial filed.

*T. H. Haskell*, for the State.

*J. & E. M. Rand*, for the corporation.

WALTON, J. When one is injured through the carelessness of a railroad corporation, but the injury is not such as to produce im-

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mediate death, a right of action accrues to such person, which, in case of his subsequent death, survives to his personal representatives; and in such a case an indictment will not lie. *State v. Maine Central Railroad Company*, 60 Me. 490.

In this case the evidence shows clearly and beyond a reasonable doubt that Pullen, the person injured, did not die immediately. He not only survived several hours, but during most of the time was conscious, and able to converse intelligently. A right of action, therefore, accrued to him, which, upon his subsequent death, descended to his personal representatives, provided he was himself in the exercise of due care at the time of the injury, and the carelessness of the railroad company, or its servants, was the sole cause of it. This is not, therefore, a case where an indictment can be maintained. The verdict is not only against evidence, but it is also contrary to law; and the motion to set it aside must be sustained and a new trial granted.

This view of the law renders it unnecessary to consider whether the deceased was or was not in the exercise of due care at the time of the injury; or whether there was or was not carelessness on the part of the railroad company, or that of its employees.

*Motion sustained. Verdict set aside and new trial granted.*

APPLETON, C. J., DICKERSON, BARROWS, DANFORTH and VIRGIN, JJ., concurred.

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**DAVIS V. EMERY.**

(61 Me. 140.)

*Sale of building to be removed by a day certain — failure to remove.*

Plaintiff bought of defendant and paid for a building to be removed by a day designated, but did not remove it within the time stated. *Held*, that the title to the building did not revert in the defendant.

**TROVER** to recover the value of a building. The opinion states the case.

S. K. & B. F. Hamilton, for plaintiff.

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*Chas. E. Clifford*, for defendant. Plaintiff's title was defeated by his failure to remove the barn by May 1. *Pease v. Gibson*, 6 Me. 81; *Davis v. Buffam*, 51 id. 160; *Reed v. Merrifield*, 10 Meto. 55.

APPLETON, C. J. This is an action of trover to recover the value of a building to which the plaintiff claims title by a bill of sale in the following words:

“NEWFIELD, Nov. 6, 1865.

“\$40.00.

“J. B. Davis bought of Elizabeth Emery one building 23 feet wide and 50 feet long, now standing west of my house and barn. Said building is to be moved off from where it now stands by the 1st of May next. Price \$40. Received pay.

“ELIZABETH EMERY.”

The building was not removed within the time specified. Upon the foregoing writing the justice presiding instructed the jury if they found that the term limited in said writing was not extended prior to the 1st of May, A. D. 1866 by the defendant, that the title to the building would revert in the defendant, and that the plaintiff would not have a right to go on and remove the same.

The plaintiff bought the barn and paid for it. As between the parties to this suit, it must be deemed personal property. The defendant, having sold it as such and received the price agreed upon, cannot claim it as a part of the realty. It stands precisely as if it had been a sale of a cart or wagon, which was to be stored by the seller for a specific time, and which was not removed by the buyer within that time. The title to the article sold and paid for would not be changed by the neglect of the purchaser to remove it at the stipulated day.

The phrase, “said building is to be moved off from where it now stands by the 1st of May next,” being included in the bill of sale to the purchaser, he must be regarded as having assented thereto and thereby impliedly to have agreed to remove it in accordance with this provision, and is liable in damages for its non-removal within the time specified. *Newell v. Hill*, 2 Meto. 180; *Pike v. Brown*, 7 Cush. 133; *Maine v. Cumston*, 98 Mass. 317. There is nothing in the language indicating that the building would be forfeited and the title revert in the seller, if a removal was not made by the 1st day of May then next.

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If it is to be regarded as a license within which time the purchaser might remove the building, still the neglect to remove would not constitute a forfeiture. The purchaser might be liable in trespass for all damage done by him to the owner of the land in removing the building, but not for the value of the property removed. *Dame v. Dame*, 38 N. H. 429. The title to the property sold was in the purchaser. *Nelson v. Nelson*, 6 Gray, 385; *Nettleton v. Sikes*, 8 Metc. 34.

The law relating to fixtures, whether as between grantor and grantee, mortgagor and mortgagee, or landlord and tenant, has no bearing upon the question under consideration. As between the buyer and seller the building was a personal chattel, which the purchaser was to remove in a given time, and until that time it was to remain on the seller's land. It was the simple case of a merchant storing goods for a limited time for the purchaser, who had paid the price therefor.

The cases cited by the counsel for the defendant are inapplicable. In *Pease v. Gibson*, 6 Greenl. 81, the sale was not of a specific article, but only of so much timber as the vendee might take off within the time limited in his contract. To the same effect are the cases of *Reed v. Merrifield*, 10 Metc. 155, and *Howard v. Lincoln*, 12 Me. 122.

In *Vincent v. Cornell*, 13 Pick. 294, oxen were sold, the title to be perfect upon payment within a stipulated time, and, the price not being paid, the title was held to remain in the vendor. So, the case of *Fairbanks v. Phelps*, 22 Pick. 535, was one of a conditional sale, the title to become perfect in the vendee when the purchase-money was paid. But in this case there was no sale on condition and there was nothing due the seller, the price having been paid at the time of the purchase.

*Exceptions sustained.*

CUTTING, KENT, DICKERSON and TAPLEY, JJ., concurred.

BARROWS, J., dissented.

## HARMON V. HARMON.

(31 Me. 227.)

*Duress — threat of prosecution.*

Plaintiff paid money to defendant under threat of criminal prosecution, but there was no threat of immediate imprisonment. *Held*, that he could not recover the money back on the ground of duress.

ASSUMPSIT to recover \$50.00 alleged to have been paid under duress.

The parties were formerly joint owners of a mill, plaintiff owning three-fourths and defendant one fourth. The mill was burned, and plaintiff collected \$300 insurance thereon. Defendant demanded one-quarter thereof. Plaintiff testified that defendant came to his house and demanded the money, and that defendant "ripped and swore very bad, damned me, and G—d d—d me. That scared me, for he is a man I haven't heard speak a wicked word for a great many years. I went out into the shed and he followed me out there, talking tremendous to me; he said he would have me in jail before night, and he would have the handcuffs on me, for I had burned the mill, and he would have the insurance. As he followed me out he had his knife, whittling this way (illustrates) as quick as I ever saw any body, and come up close to me. I started off from him and begged him to keep away from me." "My son William came and put his hand on to me and led me off into another room, and said it was best to have it settled. I told him that I should never settle it, in no way thinking I owed him a copper, but for some particular reason I consented to let him have \$50.00. When I placed the bill upon the table I told him I would let him have \$50.00, not that I owed it to him, or any thing of the kind, but for sake of saving my wife's life. \* \* \* He said I burned the mill; that he had seen three responsible men who saw me set that mill on fire. If he hadn't gone as far as that I shouldn't have let him have any money, but I found she could not stand it." Plaintiff's counsel contended that this constituted such duress as would enable him to recover the money so paid. Upon this point the jury were instructed as follows: "Duress must necessarily be one of two kinds. It either refers to threats or to imprisonment.

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There is no pretense of imprisonment here, of any kind; therefore that is laid out of the case. There is something said about threats of prosecution. That you may also lay out of the case; for a party, if he settles under a threat of prosecution, cannot recover it back in a case of this kind. This duress, or settlement under duress, must be done to relieve himself from some impending danger that hangs over him at the time, or some absolute imprisonment, which I have told you does not exist in this case. Now, was there any impending danger at that time? The plaintiff must satisfy you that there was; that there was absolute danger of serious bodily harm, either of losing his life, or a limb, or serious danger to his person on that occasion. If the testimony fail to satisfy you of that point, then the plaintiff cannot recover on this ground, because he is not to pay over his money under any less danger than that."

To these instructions the plaintiff excepted.

*E. F. Pillsbury and W. P. Whitehouse*, for plaintiff. Threats of imprisonment may amount to duress. 1 Coke on Lit. 253, 6, § 419; 2 Coke's Inst. 483; 1 Shep. Touch. 61; Story on Cont., § 91; *Eddy v. Herrin*, 17 Me. 338; *Whitefield v. Longfellow*, 13 id. 146; *Foshay v. Ferguson*, 5 Hill, 154; *Taylor v. Jaques*, 106 Mass. 291.

*Baker & Baker*, for defendant.

DANFORTH, J. No question is raised in this case except under the second count in the writ, which is for money paid under an alleged duress, arising from threats of a criminal prosecution and personal injury. The first instruction excepted to is that a threat of prosecution does not constitute duress. In this we see no error. Bacon, in his Abridgment, vol. 2, p. 156, referring to Lord COKE, says: "That for menaces, in four instances, a man may avoid his own act. 1. For fear of loss of life; 2. Of loss of member; 3. Of mayhem; 4. Of imprisonment." A prosecution cannot come under either of the items of personal violence; unless, therefore, it implies imprisonment it cannot constitute duress. All the cases to which our attention has been directed, or which, after considerable research, we have been able to find, hold threats of prosecution sufficient to avoid an act only as they are connected with threats of imprison-

ment, either illegal in its beginning, or which by abuse becomes illegal. There must be imprisonment, or fear of it, sufficient to overcome the will of a man of ordinary firmness and constancy. COKE says it is the fear of imprisonment "that sufficeth to avoid a bond or a deed." In *Whitefield v. Longfellow*, 13 Me. 146, and *Eddy v. Herrin*, 17 id. 338, it is held that there must be an unlawful imprisonment or a reasonable fear of it. In both of these cases a warrant for the arrest of the threatened party had been procured. To the same effect is 2 Kent's Com. 453; Story's Pl. 249, 250; 2 Greenl. Ev., § 301, and note; 1 Pars. on Cont. 393, 394.

The two cases mainly relied upon in argument are clearly distinguishable from this. In *Foshay v. Ferguson*, 5 Hill, 154, the threat relied upon is that of arrest upon a real or pretended warrant, and not simply of prosecution. In *Taylor v. Jaques*, 106 Mass. 291, the threat was not only of a prosecution, but of an immediate imprisonment, and on a warrant alleged to have been already procured. In this last case the jury were instructed, substantially, that duress must be by unlawful imprisonment, or by threats of imprisonment, inducing a reasonably grounded fear of restraint of liberty. This instruction was held to be substantially correct, and the exceptions on this point were sustained only on the ground that the jury were subsequently told that an admission of indebtedness, on the part of the defendant, to the amount claimed, or to part of that amount, and a liability to indemnify the plaintiffs, for damages he had caused them, for the balance, would repel the inference of duress, although indicated by the other facts in the case. This case cannot properly be cited as authority to show that any thing short of illegal imprisonment, or a well-grounded fear of it, will constitute duress.

It should be observed that in the case at bar no instructions were given and none asked as to the effect of threats of imprisonment. If the case required such, the counsel should have asked them, and in the absence of such request exceptions will not be sustained, unless the rule of law given is erroneous. Some of the testimony in the case may have a tendency to prove threats of imprisonment, but none connected with a prosecution, or growing out of a warrant already obtained or even threatened. There is in the case no allusion to any precept issued or to be issued. A threat of prosecution simply, before the commencement of any legal proceedings, does not necessarily include an arrest. It is no more than an assertion that the proper steps will be taken to institute a legal process, which



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may or may not result in an arrest of the person. And whether the process is to be initiated before a magistrate or the grand jury, the law so shields it by the oath of the complainant and witnesses, as well as the official oaths and responsibilities of the magistrate and jurors, that the danger of imprisonment from such a threat is too remote and contingent to overcome the will of an innocent person of common firmness.

Another answer to this exception is that the instruction was not material. If from the testimony it can, by any possibility, be inferred that there were any threats of criminal prosecution, it does not appear that the plaintiff's will was overcome by them, but quite the contrary. According to his own testimony, if his will was overcome by any thing other than a submission to a claim of an amount due, it was by the danger of personal injury, or rather the effect of the violence manifested upon his wife. It is true an act done to relieve the wife from duress may be avoided; but this case is not put upon that ground. All the duress complained of is upon the plaintiff himself.

The second instruction complained of, that of threats of personal injury, seems to be abandoned in the argument. But if not, it is in accordance with all the authorities. It is true that the later authorities have somewhat modified the older, requiring a less degree of personal injury than formerly to justify a man in yielding for the time, still all hold that there must be an apparent danger of serious bodily harm. 1 Pars. on Cont. 393; 2 Greenl. on Ev., § 301, and note.

*Exceptions overruled.*

APPLETON, O. J., OUTTING, DICKERSON, VIRGIN and PETERS, J.J., concurred.

## KING V. CROWELL.

(61 Me. 244.)

*Promissory note — demand, where made — exhibition of note — notice to indorser when not premature.*

in an action against the indorser of a promissory note payable without place named, *held*, (1) that a demand on the maker in the street was good, he having no place of business, and raising no objection to the demand; (2) that an actual exhibition of the note at the time of the demand was unnecessary, the holder having the note with him, and there being no request to produce it and (3) that notice to the indorser upon the last day of grace, after demand upon the maker, was not premature.

ASSUMPSIT against Andrew J. Crowell, as indorser of the following promissory note:

“ \$150.

April 8, 1871.

“ Four months after date I promise to pay to the order of A. J. Crowell one hundred and fifty dollars. Value received.

“ H. E. Morton.”

Indorsed — “ A. J. Crowell, Jeremia Glidden, C. H. Glidden.”

The maker and indorsers of the note resided in Winthrop village, and the plaintiff, to whom the note was indorsed, in Monmouth. When the note was made, the maker had a place of business in Winthrop, but he afterward failed and closed his store. Plaintiff, on the 11th of August, 1871, went to Winthrop to collect the note, or to take the necessary steps to hold the indorsers. Not finding the maker at his former store, he went to his house; was told that he was on the street, and there plaintiff found him and demanded payment of the note, which was refused; afterward, on the same day, plaintiff notified defendant of the demand and refusal, and that he should look to him for payment of the note.

Upon these facts it was agreed that the court should enter judgment.

*E. Kempton*, for plaintiff.

*J. H. Potter*, for defendant. Demand made upon the maker on the street is not sufficient. Byles on Bills (5th Am. ed.), 196, note

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1; 1 Pars. on Notes and Bills, 372, 421; *McGruder v. Bank of Washington*, 9 Wheat. 198; *King v. Holmes*, 11 Penn. St. 456; *Full River Union Bank v. Willard*, 5 Metc. 216; *Otsego County Bank v. Weaver*, 18 Barb. 292; *Sanderson v. Judge*, 2 H. Black. 509. The note should have been exhibited. Byles on Bills (Am. ed.), 196; 1 Pars. on Notes and Bills, 230, note x, 367; *Freeman v. Boynton*, 7 Mass. 453; *Musson v. Lake*, 4 How. 262; *Draper v. Clemens*, 4 Mo. 52. The maker is not bound to pay without presentation of the note. *Hansard v. Robinson*, 7 B. & C. 90; 9 Dow. & R. 860. The notice to the indorser was premature. The maker had the whole day in which to pay the note. *Pierce v. Cate*, 12 Cush. 190; *Henry v. Jones*, 8 Mass. 453; *Wiggle v. Thompson*, 11 S. & M. 452; *Osburn v. Moncure*, 3 Wend. 170; *Crosby v. Grant*, 36 N. H. 275; 1 Pars. on Notes and Bills, 411.

VIRGIN, J. When the defendant indorsed and put into circulation the note in suit, he thereby ordered the maker to pay the amount therein specified to the plaintiff; and he also thereby promised that if the note were duly demanded of the maker and not paid, then he himself would, upon receiving due notice of the demand and non-payment, pay it to the plaintiff.

And now, in this suit upon his promise, the defendant declines to pay the note on the following alleged grounds:

1. That the demand was not lawful, inasmuch as it was made on the street.

The general rule of law is that the holder must use diligence to find the maker and demand payment of him; and the inquiry will be, whether, under the circumstances of the case, due diligence has been used. 3 Kent's Com. 129.

It is a familiar law that when a promissory note payable generally, and not at a specified place, is seasonably demanded at the maker's known and settled place of business for the transaction of his moneyed concerns, it is sufficient to hold the indorser. And the same may be said of a like demand made at his place of residence. Neither does it make any difference whether the maker be personally present or temporarily absent at the time of the demand. In either case the law has for many years been constant in declaring that the evidence afforded by such a demand constitutes full proof of due diligence on the part of the holder.

But in the case at bar the plaintiff went still further than the

technical exactions of the law required. He was a resident of Monmouth. On the day the note became due he went to Winthrop village, where both the maker and the defendant resided, "for the purpose of collecting this note, or of taking the necessary steps to hold the indorser." On going to the store which had been occupied by the maker as his place of business, he found it had been closed and in the possession of an officer more than thirty days; that the maker had failed in his business, and that all his property was under attachment. Thereupon the plaintiff went to the maker's place of residence, where he was informed that the maker was not at the house, but had gone out on the street. Had he gone through the ceremony of demanding payment of the note at the house, while the maker was out on the street, the law would pronounce the plaintiff's diligence ample. But not finding the maker at home the plaintiff trebled his diligence, sought and found him on the street in that country village, and then and there requested payment of the note of the maker personally, which was refused.

It does not appear (as it would be likely to, if true) that any objection to the place of demand was made by the maker. If he had had funds with which to pay, not with him, but at his house, he would at once have said so. If he had objected to the place and requested the plaintiff to accompany him to his house and receive the money due on the note, and the plaintiff had declined so reasonable a request, the legal aspect of this branch of the case might thereby have been materially changed. But no such facts exist. He simply refused payment, and, in all human probability, for the real, though to him, perhaps, unpleasant, reason that all his property was in the custody of the law, and he had in fact nothing wherewith he could pay.

It would seem that such a demand would be more satisfactory to all concerned than a mere formal ceremony of a demand gone through at his place of residence during the maker's absence. And we have no hesitation in declaring the demand sufficient under the circumstances, so far as the place is concerned, to charge the defendant.

We are aware that Byles on Bills, 196, declares that a demand made on the street is not sufficient. Such is the doctrine expressed, too, in the author's notes in Lead. Cas. on Bills, 327, 328. And there are several cases containing the *dictum* in general terms that a demand must be made either at the maker's place of business or

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place of residence. But our attention has been called to no case, neither have we, after considerable research, been able to find any wherein the court having the question before it decided adversely to a demand made on the street, under circumstances similar to those in this case.

On the other hand, Judge STORY, in discussing the law applicable to notes like this, uses the following language: "The general rule is, that the presentment for payment may be made to the maker personally, or at his dwelling-house or other place of abode, or at his counting-house or place of business. It seems a presentment may always be made personally to the maker, wherever he may be found, although he may not be either at his domicile, or at his place of business." And he cites quite a large number of cases, in a note, as authority. STORY on Prom. Notes, § 235.

In *Edwards on Bills* (2d ed.), 150, is found the following: "Being made payable at large, it is due at any and every place; but for the purpose of charging the indorser, it must be presented for payment to the maker personally, or at his residence or place of business. If it be made payable at a particular place in the city, it is necessary to present the note there for payment, for the purpose of charging the indorser. But even in this case, if a personal demand is made upon the maker, and no objection is made by him as to the place, it is sufficient."

So in 3 Kent's Com. 128. "Demand of payment must be made by the holder or his agent upon the acceptor at the place appointed for payment, or at his house or residence, or regular known place of his moneyed business, or upon him personally, if no particular place be appointed." And again, on page 96, "If demand be made upon the maker elsewhere than the place appointed, and no objection be made at the time, it will be deemed a waiver of any future demand."

And Prof. Parsons says: "In general a personal demand would be sufficient, if made at any place where the maker may reasonably be expected to be in condition to pay; and if made in any other place — such, for instance, as in the street — it would usually be good, unless objection were made to payment because the place was an improper one, or some similar reason were given for the refusal. 1 Pars. on Notes and Bills, 421. And he uses somewhat similar language on p. 372.

The doctrine as stated above by STORY, J., is approved in *Taylor*

v. *Snyder*, 3 Denio, 145, published as a leading case in *Leading Cases on Bills*, 313, 316.

Finally, our own court held, that where a note signed by two, made payable at their dwelling-houses, was demanded of them, together, at the barnyard of one of them, and no objection was made as to the place of the demand, the demand was sufficient. *Haldwin v. Farnsworth*, 10 Me. 414.

2. But the defendant further objecting to the sufficiency of the demand says: "As the payer has a right to require its delivery up to him before he pays, and may insist that the holder produce it, the note should have been exhibited."

It is true that the rule requiring the person making the demand to exhibit the evidence of debt is well settled, and well grounded in reason; and, although applicable to all written contracts on which a demand is necessary, it is, as has been well said, especially applicable to negotiable securities, which may be legally transferred to another at the very time the original payee makes the demand. But the reasons applicable to cases in which the maker offers to pay cannot apply to cases in which he not only does not offer, but absolutely refuses, to pay, and does not even express any desire to see the note.

The idle ceremony of producing the note when the maker unqualifiedly refuses to pay is well illustrated by SHAW, C. J., in *Gilbert v. Dennis*, 3 Metc. 497, where he says: "Even under the law of tender, which is extremely strict, it is held that where a party to whom a tender is to be made declares that he will not accept it, an actual production and offer of the money is not necessary."

The case finds expressly that the maker had the note in his possession when he made the demand. We think the objection cannot prevail. *Arnold v. Dresser*, 8 Allen, 435; *Freeman v. Boynton*, 7 Mass. 485; *Etheridge v. Ladd*, 44 Barb. 69.

3. The defendant finally contends that the notice having been given to the defendant on the last day of grace was premature, for the reason that the maker had the whole day in which to pay.

We presume, however, that the defendant predicated this objection upon the alleged insufficiency of the demand. For long before, and certainly ever since, the review of the cases by SHAW, C. J., in *Staples v. Franklin Bank*, 1 Metc. 43, the rule applicable to notes like the one in question has been that the note is due on actual demand at any such hour on the last day of grace that, having

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regard to the habits and usages of the community where the maker resides, he may be reasonably expected to be in condition to attend to ordinary business; and if, upon such demand, payment is not made, the maker is in default, and notice of dishonor may forthwith be given to the indorser. But if no such demand be made, and the maker does nothing amounting to a waiver, he has the whole of the day in which to make payment, and is not in default until the expiration of the business day within which such demand might have been made. *Greeley v. Thurston*, 4 Greenl. 479; *Flint v. Rogers*, 15 Me. 67; *Lunt v. Adams*, 17 id. 280; *Farnsworth v. Allen*, 4 Gray, 413; *Estes v. Tower*, 102 Mass. 65; S. C., 3 Am. Rep. 439; *Gordon v. Parmelee*, 15 Gray, 413; *Manchester Bank v. Fellows*, 28 N. H. 303; *Crosby v. Grant*, 36 id. 418.

*Defendant defaulted.*

APPLETON, C. J., CUTTING, DICKERSON, DANFORTH and PETERS, JJ., concurred.

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WARE V. PERCIVAL

(61 Me. 391.)

*Taxation—remedy for taxes illegally assessed and paid—election of remedies.*

Plaintiff's property was seized and sold to pay an assessment which was illegal because of want of jurisdiction of the assessors. *Held*, that plaintiff had two remedies, either against the assessors in tort or against the town in assumpsit, for the proceeds of the property, but having elected the latter remedy and recovered judgment against the town, which was satisfied, he could not proceed against the assessors.

TRESPASS against Percival and others for the conversion of shares of Maine Central Railroad stock belonging to plaintiff. The defendants were assessors of the town of Waterville, and assessed plaintiff as an inhabitant, which he was not. The defendants pleaded a former recovery by the plaintiff in an action of assumpsit against the town of Waterville for the proceeds of the said stock and the satisfaction of said judgment.

Whether such a recovery and satisfaction was a bar to the suit was submitted to this court.

*A. H. Ware*, for plaintiff.

*A. Libbey*, for defendants.

APPLETON, C. J. This is an action of trespass for unlawfully taking and carrying away certain shares of the capital stock of the Maine Central Railroad Company, the property of the plaintiff.

The defendants are assessors of the town of Waterville. The plaintiff was assessed by them as one of its inhabitants. Not being one, the assessors had no jurisdiction. A warrant was issued in due form of law to the collector of said town, who seized and sold the stock in controversy, and paid over the proceeds of such sale to its treasurer.

The property of the plaintiff having been seized and sold to pay an illegal assessment, the assessors having no jurisdiction, the plaintiff had two remedies, either of which he might pursue. He might sue the assessors in tort, or, waiving the tort, he might bring assumpsit against the town for the proceeds of the property sold. The damages are determined upon different principles, as the remedies pursued are in tort or assumpsit. Electing one of two forms of action, the party elects that his damages shall be determined by the rules which govern in assessing damages in the remedy adopted. The plaintiff, having his election as to the remedy to be pursued, brought his action of assumpsit, pursued it to judgment, and has received full satisfaction of the execution issued upon such judgment. In that suit, the tort being waived, he recovered judgment only for the proceeds of the stock sold and interest thereon.

Having thus affirmed the sale by claiming the proceeds and receiving the same, he now in this action demands damages for the tort heretofore waived. But the plaintiff, having elected his remedy and received the satisfaction which the law gives in such case, cannot revive his cause of action. A claim arising from one entire and continuous tortious act cannot be divided into distinct demands and made the subject of separate actions. A plaintiff cannot divide his cause of action, recover compensation in assumpsit by waiving the tort, and then, having received such compensation, resort to the tort which has been waived, and in that again recover compensation



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as though the tort had not been waived. He cannot waive all wrongdoing and recover compensation upon that basis, and then, treating the tort once waived as a subsisting grievance, recover damages which are to be assessed upon different principles. Neither can he recover part compensation in assumpsit, thus waiving his tort, and then, resorting to it as an existing wrong, recover the residuum of damages in another form of action. He cannot split his cause of action into fractional parts, and recover for such fractions in different suits and upon different grounds of action.

In *Inglee v. Bosworth*, 5 Pick. 502, a suit was brought against the assessors for an assessment which was unauthorized and illegal. In delivering the opinion of the court, MORTON, J., says: "Although the money collected by this illegal distress and paid into the parish treasury might have been recovered by an action for money had and received against the parish (*Amesbury W. & C. Manuf. Co. v. Amesbury*, 17 Mass. 461; *Sumner v. First Parish in Dorchester*, 4 Pick. 361), yet in that form of action the remedy might not have been commensurate with the injury, and the defendant was not bound to resort to that mode of redress." But, if he does resort to that mode of redress, he must be bound by the damages which are there obtainable. These, as has been seen, are limited to the proceeds of the property sold illegally. *Dow v. Sudbury*, 5 Metc. 73; *Shaw v. Becket*, 7 Cush. 443.

Having sought and obtained the redress which the form of action first chosen gave him, he cannot be permitted again to renew litigation for a grievance once waived, and without the waiver of which he was not entitled to recover.

*Judgment for the defendants.*

CUTTING, DICKERSON, DANFORTH, VIRGIN and PETERS, JJ ,  
concurrd.

## SEEKINS V. GOODALE.

(51 Me. 400.)

*Trespass — distress for taxes — sale in excess of demand.*

A collector of taxes, having seized more chattels than sufficient to pay the tax and expense of sale, after selling enough for that purpose, proceeded further and sold all the balance of the distress consisting of distinct and separate articles. *Held*, that he was a trespasser only as to the goods in excess of the tax and expenses.

TRESPASS for the conversion of five pieces of cloth. Defendant justified under plea that the goods were taken and sold by him as collector of taxes to satisfy a tax. The tax was poll tax, \$3.00, and tax on personal property, \$21.78; the expenses of sale, etc., were \$1.62. The goods sold for \$49.36, the first three pieces sold netting \$26.66, the third having been bid off for \$11.75. The defendant returned to the plaintiff an account of sale and \$22.96 in cash. The defendant claimed that he was not an inhabitant of Hartland on the 1st day of April, 1870. He testified that at their retail prices all the goods were worth \$75.44.

If upon these facts the plaintiff was entitled to recover, the court was to enter judgment for such sum as he ought to have; if he would become entitled to recover on proof that he was not taxable in Hartland that year, the case was to stand for trial; but if not entitled, and if he would not be entitled on such evidence to recover, a nonsuit was to be entered.

*C. A. Farwell* and *George W. Whitney*, for plaintiff. By the sale of the last two pieces of cloth, after the first three had sold for enough to pay the tax, the collector became a trespasser *ab initio*. *Carter v. Allen*, 59 Me. 296. *Williamson v. Dow*, 32 id. 559, is decisive of this case. As Mr. Seekins was not resident in Hartland, this action must prevail. *Bowker v. Lowell*, 49 Me. 429; *Preston v. Boston*, 12 Pick. 12. *Caldwell v. Hawkins*, 40 Me. 526, does not militate against this, because in that case the assessors had jurisdiction. *Suydam v. Keyes*, 13 Johns. 444.

*D. D. Stewart*, for defendant.

PETERS, J. The collector, having seized more goods and chattels than sufficient to pay the tax and expense of sale, after selling enough for that purpose proceeded further and sold all the balance of the distress remaining in his possession. This balance consisted of articles distinct and separate from those which were sold before the authority to sell was exhausted. The officer was actuated by no improper motive; and, in the attempt to perform his duty, followed so literally the provision of the statute prescribing that duty that his counsel contends that in all his doings he acted legally. The words of the statute are "the distress shall be openly sold." But it would be an unsatisfactory construction to say that the authority is to sell more of such distress than would be ample for the purposes for which the authority is conferred.

The question arises whether the officer was a trespasser *ab initio* as to all the property taken and sold, or only as to so much of it as was sold in excess of the requirements of law.

In *Dod v. Monger*, 6 Mod. R. 215, where several barrels of beer were distrained for rent, and the distrainer drew beer out of one of them, Lord HOLT held that it rendered him a trespasser *ab initio* only as to that single barrel. In *Harvey v. Pocock*, 11 Mees. & Wels. 740, it was decided that "where a landlord distrains for rent; among other things, goods in law not distrainable, the distrainer is a trespasser *ab initio* only as to the goods which were not distrainable." Lord ABINGER, C. B., says: "The case in 6 Mod. R. 215 is undoubtedly a very strong authority for the defendants. The Six Carpenters' case leaves it an open question how far the party becomes a party *ab initio* as to the whole distress by an excess as to part. It is very reasonable that he should not, but that his liability should be limited according to the doctrine laid down by Lord HOLT." This last case is approvingly alluded to in *Price v. Woodhouse*, 1 Exch. 559. In Smith's Leading Cases the doctrine is stated as follows: "But if there be a seizure of several chattels, some of which are by law seizable and some not, or some of which are subsequently abused and the rest not, the seizure is, or becomes, illegal only as to the part which it was unlawful to seize, or which was subsequently abused, and the seizure of the rest continues legal." In *Walcott v. Root*, 2 Allen, 194, the point is stated by the court but not decided. It is contended by the plaintiff that *Williamson v. Dow*, 32 Me. 559, decides that an officer would be liable in a case like the present for the entire value of all the

articles distrained. It will be seen upon examination that the marginal note in that case is not authorized by the opinion of the court. The opinion is very brief, and while upon this point it is merely said that when an officer has sold sufficient property he is not authorized to sell more, the court adds: "there is also the same defect noticed in the case of *Blanchard v. Dow* (a previous case in same volume), in the neglect to return with the overplus an account of sales and expenses." Upon this last point the case was really and necessarily decided, and need not be considered as limited or overruled by our conclusions in the case now before us. Nor is the doctrine of Lord HOLT opposed by the case of *Moore v. Pennell*, 52 Me. 162, where an officer attached an undivided half of chattels, and selling the entire property in the goods attached was held a trespasser *ab initio* as to the full value of the goods sold. The reasons given for the result reached in that case are not applicable here. There the officer committed upon each and every article of the property attached an act in excess of his authority which amounted to a conversion or trespass, while here no act of any sort was committed or neglected which would render the action of the officer irregular or abusive, excepting so far as the particular articles were concerned which were sold after the authority to sell had been fully executed. Had he stopped when he had sold enough for the payment of the tax and expense of sale no error would have been committed. Not even would a neglect of returning the balance of the property to the owner have been, according to many authorities, such an irregularity as to render him liable for the value of the whole distress, because such an act would have been a non-feasance only. His proceedings subsequently were a fresh trespass, by relation dating back to the first taking of such of the articles only as were sold in excess of authority. The Six Carpenters' case speaks of the trespasser *ab initio* as one "who works or kills the distress." How has the officer in this case "worked or killed" so much of this distress as was legally sold? We think a fair construction of the rule established in the Six Carpenters' case makes the defendant liable as a trespasser *ab initio* only for the sale of so much of the goods as were sold in excess, and not for those sold in pursuance of authority. In this case it will work out exact justice to all concerned. The debtor will have paid his tax; the officer will receive the protection of the law as long as he obeyed the law, and for the injury inflicted by his abuse of it the party injured will

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Seekins v. Goodale.

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be indemnified for all damages actually sustained. A doctrine which will ameliorate the hardships imposed upon honest officers rather than that which will put difficulties and dangers in their way is the safe and salutary one. The contrary doctrine would render a sheriff, who, upon an execution amounting to thousands of dollars, sold more goods by a few dollars only than was necessary to cover the amount of such execution and costs of sale, for an error or inadvertence such as a man of common care and common intelligence might commit, exposed to most hazardous consequences.

It is not perceived that the positions taken by counsel as to the conclusiveness of the officer's return have any application in this case. The return is not necessarily contradicted by the facts set up and proved by the plaintiff.

Another question raised in the report was lately settled in *Nowell v. Tripp*, see *post*, p. 572, to wit: that the officer's warrant is a full protection to him so far as he has not exceeded or abused its authority.

The sum required by the collector for the tax and charges was \$26.40. The first three articles were sold for \$26.66, leaving to be returned twenty-six cents. The other articles sold for \$22.75. The evidence shows that they were worth about fifty per cent more than sold for, which would make their value \$34.05. This sum, added to twenty-six cents plaintiff would be entitled to, less \$22.96, which was left with him, would go in mitigation of damages to that extent.

The defendant is to be defaulted for \$11.35 and interest from June 22, 1871.

APPLETON, C. J., CUTTING, DICKERSON, DANFORTH and VIRGIN, JJ., concurred.

## NOWELL v. TRIPP

(61 Me. 429.)

*Taxes — collector of, justified by warrant.*

A collector of taxes, legally qualified, acting within the scope of his powers under a warrant from the assessors of his town, is protected against all illegalities but his own, even though the assessors had not in fact any jurisdiction over the person they assumed to tax.

In an action of trespass against a tax collector for arrest and false imprisonment, the defendant justified under a warrant from the assessors of the town. *Held*, a good defense, although the plaintiff was not liable to taxation by the assessors.

TRESPASS for arrest and false imprisonment. The defendant, who is a tax-collector, justified under a warrant from the assessors of the town authorizing and directing him to collect a tax from plaintiff and to enforce the collection thereof, if necessary, by arrest and imprisonment. It was admitted that the assessors were duly chosen and qualified, and that the assessment, warrant, etc., were in due form. There was, however, evidence tending to show that plaintiff was not a resident of the town when the assessment, which was on personal property, was made. At the trial the presiding justice charged the jury "that said warrant afforded no legal justification of said officer, James H. Tripp, unless the jury should find the house and domicile of the plaintiff was at said Kennebunkport at the time of the assessment of said tax, April 1, 1869." The jury returned a verdict for the plaintiff, and defendant excepted.

*S. W. Luques*, for defendant.

*Howard & Cleaves* and *Peters & Wilson*, for plaintiff. The assessors of Kennebunkport having no jurisdiction to assess Capt. Nowell, of Bangor, upon his poll and personal property, their whole proceedings were void *ab initio*, and their warrant conferred no authority upon the defendant to execute it. *Bowker v. Lowell*, 49 Me. 429; 2 Bouv. Law Dict., title "Trespass," 7, 4; *Preston v. Boston*, 12 Pick. 12; 9 Bac. Ab. 446; *Thurston v. Martin*, 5 Mason,

## Nowell v. Tripp.

497. R. S. of 1857, chap. 6, § 29, did not protect assessors who erroneously assessed one not an inhabitant of their town. *Freeman v. Kenney*, 15 Pick. 44; *Dickinson v. Billings*, 4 Gray, 42. Then, if they are not protected, but are mere trespassers, so is one who obeys a direction they are not authorized to give.

WALTON, J. It is the settled law of this State that a collector of taxes, legally qualified, acting within the scope of his powers, under a warrant from the assessors, is protected against all illegalities but his own. *Judkins v. Reed*, 48 Me. 386; *Caldwell v. Hawkins*, 40 id. 526; *Ford v. Clough*, 8 id. 342.

In the case last cited, MELLE, C. J., says, that a collector is not responsible for any irregularities on the part of others, antecedent to the commitment of the assessment to him for collection; that "his warrant is his protection against all illegality but his own."

The law is the same in Massachusetts. 10 Mass. 119; 13 id. 279; 19 Pick. 440; 5 Metc. 362; 8 id. 102; 6 Gray, 387; 7 id. 129; 102 Mass. 75.

In New Hampshire, in one case, the court held that in order to justify the seizure of property to enforce the payment of a tax, the collector must show that the tax was legally granted. *Cloutman v. Pike*, 7 N. H. 209. But the legislature at once interfered and corrected the error, by enacting a statute declaring that "collectors should not be liable for any irregularities of the town or the selectmen, nor for any cause whatever, except their own illegal conduct." *Kinsley v. Hall*, 9 N. H. 190.

So in New York, in one case, Mr. Justice PLATT declared the rule to be that "all subordinate officers are bound to see that those who command them act within the scope of their legal powers." *Suydam v. Keyes*, 13 Johns. 444. But this opinion was afterward reviewed by Mr. Justice MARCY in a very full and able manner, and shown to be in conflict with the previous decisions in that State as well as contrary to reason and the fundamental principles of the common law; and the true rule was declared to be that "a ministerial officer is protected in the execution of process, whether the same issue from a court of limited or general jurisdiction, although such court have not, in fact, jurisdiction in the particular case, provided that on the face of the process it appears that the court has jurisdiction of the subject-matter, and nothing appears in the same to apprise the officer but that the court also has juris-

diction of the person of the party affected by the process." *Savacool v. Boughton*, 5 Wend. 171.

This is a leading case upon this branch of the law ; and it has been approved and followed in a great variety of subsequent cases, not only in New York, but in other States, and by the Supreme Court of the United States. See 16 Wend. 514, 563. And for the application of the principle to the protection of a collector for taxes, see 2 Denio, 86 ; 27 Barb. 34 ; 30 id. 618 ; 1 Seld. (5 N. Y.) 376.

In one case tried before Judge STORY, he ruled that a collector of taxes was liable for arresting one wrongfully taxed as an inhabitant. *Thurston v. Martin*, 5 Mason, 497.

But the Supreme Court of the United States, in a recent decision, have overruled the doctrine of that case. The court say that "whatever may have been the conflict at one time in the adjudged cases, as the extent of protection afforded to ministerial officers acting in obedience to process, or orders issued to them by tribunals or officers invested by law with authority to pass upon and determine particular facts, and render judgment thereon, it is well settled now, that if the officer or tribunal possesses jurisdiction over the subject-matter upon which judgment is passed, with power to issue an order or process for the enforcement of such judgment, and the order or process issued thereon to the ministerial officer is regular on its face, showing no departure from the law, or defect of jurisdiction over the person or property affected, then, and in such cases, the order or process will give full and entire protection to the ministerial officer in its regular enforcement against any prosecution which the party aggrieved thereby may institute against him, although serious errors may have been committed by the officer or tribunal in reaching the conclusion or judgment upon which the order or process is issued ;" that a collector of taxes cannot revise, or refuse to enforce, the assessment ; that his duties are purely ministerial ; that the assessment, duly certified to him, is his authority to proceed ; and, like an execution to a sheriff, regular on its face, issued by a tribunal having jurisdiction of the subject-matter, constitutes his protection ; that the tax payer can no more complain of the collector who enforces a tax, on the ground that he was not liable to taxation, than a judgment debtor can complain of a sheriff who enforces an execution, on the ground that the



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Nowell v. Tripp.

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court erred in finding that he was indebted to the plaintiff. *Erskine v. Holmbach*, 14 Wall. 613.

We understand it to be conceded that if the assessors erroneously tax one as the owner of property, when in fact he is not the owner of it, the collector may, nevertheless, enforce payment of the tax with impunity.

But it is said that if the assessors erroneously tax one as an inhabitant, when in fact he was not an inhabitant, the collector will not be protected in collecting the tax. The distinction is sought to be maintained that in the one case the assessors have jurisdiction, and in the other not. In our judgment no such distinction can be maintained. It has no rational principle to rest upon. In determining what persons are to be taxed, the assessors are as clearly performing an official duty, one which they cannot legally escape from, as in determining what property is to be taxed; and there is no more reason for holding the collector responsible for an error in the one case than in the other.

Questions of domicile are among the most difficult which courts as well as town officers have to deal with; and yet such questions must be decided. It will not do to allow every one to escape taxation who can manage to leave his habitancy in doubt. And in a doubtful case if the assessors do not determine the question, who will? Is there any other tribunal to whom it can be referred? Certainly not. The assessors must decide; and in doing so they are no more acting outside of their jurisdiction than in determining what property shall be taxed. And in our judgment an error of the assessors in taxing one as an inhabitant of their town, when, in fact, he was not an inhabitant, forms no exception to the rule that a collector's warrant is his protection against all errors and illegalities but his own. His warrant is his protection against such an error, or illegality, as well as every other committed by the assessors, provided the error does not appear upon the face of his warrant, nor in the list of assessments committed to him for collection.

*Exceptions sustained.*

APPLETON, C. J., CUTTING, DICKERSON and DANFORTH, JJ.  
concurred.

**CASES**  
**IN THE**  
**SUPREME JUDICIAL COURT**  
**OF**  
**MASSACHUSETTS.**

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**DUNBAR v. BOSTON & PROVIDENCE RAILROAD CORPORATION.**

(110 Mass. 26.)

*Common carrier — delivery to wrong person.*

A B, representing himself as C D of P., bought goods of the plaintiff; the goods were marked for C D and delivered to the defendants, common carriers, who carried them to P. A B, who was known to the defendants by his real name, applied for them as the property of C D. and the defendants delivered them to him on his receipt, but without his producing a bill of lading which the defendants had given to the plaintiff, promising to deliver the goods to C D or order. There was no C D in P. *Held*, that the defendants were not liable to the plaintiff for delivering the goods to A B.

**TORT** against common carriers. The first count of the declaration was for negligently losing a quantity of gin and whisky intrusted to the defendants. The second count was for delivering the liquors to the wrong person. The case was submitted to the judgment of the Superior Court, and, on appeal, of this court on the following agreed facts:

On October 17, 1870, John F. Gorman, a stranger to the plaintiff, representing himself to be John H. Young, of Providence, in Rhode Island, purchased the liquors of the plaintiff at Boston, on a credit of thirty days. They were marked by his order "John

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Dunbar v. Boston and Providence Railroad Corporation.

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H. Young, Providence, R. I.," were delivered to the defendants to be carried to Providence, were so carried, and were received there and stored in the defendants' freight-house, October 19. The plaintiff, on shipping the liquors, received a bill of lading from the defendants, in which they promised to deliver them at Providence to John H. Young or order; and the plaintiff sent this bill of lading by mail addressed to "John H. Young, Providence, R. I.," but the letter containing it remained in the post-office at Providence until remailed to the plaintiff, November 23.

On October 29, Gorman called at the freight-house in Providence, asked for the liquors as the property of John H. Young, and paid the freight; and the liquors were delivered to him upon his receipt, which he signed "John F. Gorman." Gorman was known to the clerk who delivered the liquors. No person named John H. Young resided or did business at Providence, and no person authorized the purchase of the goods by Gorman in that name. After the delivery of the liquors to Gorman, the plaintiff demanded them of the defendants. If on these facts the plaintiff was entitled to recover, judgment to be rendered for him for the value of the liquors; otherwise, judgment for the defendants.

*C. S. Lincoln*, for plaintiff, cited *Stephenson v. Hart*, 4 Bing. 476; *Winslow v. Vermont & Massachusetts Railroad Co.*, 42 Vt. 700; S. C., 1 Am. Rep. 365; *Gibson v. Culver*, 17 Wend. 305; *Schroeder v. Hudson River R. R. Co.*, 5 Duer, 55, 62; *Hall v. Boston & Worcester Railroad Co.*, 14 Allen, 439; *Finn v. Western Railroad Co.*, 102 Mass. 283, 291.

*W. G. Russell*, for defendants, cited *Heugh v. London & Northwestern Railway Co.*, L. R., 5 Ex. 51; *M'Kean v. M'Iver*, L. R., 6 id. 36; *Price v. Oswego & Syracuse Railroad Co.*, 58 Barb. 599.

CHAPMAN, C. J. The plaintiff sold the gin and whisky, which are the subject of this action, to a person calling himself John H. Young, of Providence, and delivered them to the defendants to be carried to the same person in Providence by the same name. As he was the only person in Providence who bore that name, there was no other individual to whom the defendants could deliver the property. A delivery to him would be a performance of the contract. The fact that he was known to the delivery clerk as John F. Gor-

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Churchill v. Hulbert.

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man made it necessary for him to conceal from the clerk the fictitious name, and to pretend that he was acting as an agent or servant of John H. Young. He was thus enabled to obtain the property, but by means of this deceit the property reached the person to whom the plaintiff sold and consigned it. Thus the contract of the defendants was performed in its spirit and letter, and the plaintiff has no cause of action against them.

*Judgment for the defendants.*

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CHURCHILL V. HULBERT.

(110 Mass. 42.)

*Assault — justification.*

In an action for an assault the defendant cannot justify on the ground that he had an irrevocable license to enter upon the plaintiff's land for the purpose of removing his personal property therefrom, and that the plaintiff withstood his entry.

MORTON, J. This is an action of tort for an assault and battery. The evidence tended to show that the defendant forcibly entered the premises of the plaintiff for the purpose of removing certain manure which he claimed as his property; that the plaintiff, being present, forbade his entering, and resisted it by seizing the heads of the defendant's horses to prevent them from proceeding further, and thereupon the defendant struck him with a shovel and broke his arm, and then proceeded to remove the manure. The defendant claimed that he had an irrevocable license to enter and remove the manure, and asked the court to instruct the jury, "that if the defendant had a license from the plaintiff, unrevoked or irrevocable, to enter the plaintiff's premises to remove manure which belonged to the defendant, and the defendant did no more than was necessary to enter and remove the same manure, he is not liable in this action." The court refused this request, and instructed the jury in substance, that though the defendant had an irrevocable license to enter and remove the manure which belonged to him, yet if the plaintiff resisted the defendant's entry, under a claim that the

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**Florence Sewing Machine Co. v. Grover and Baker Sewing Machine Co.**

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defendant had no manure left on the premises, the defendant had no right to use personal violence to overpower the plaintiff's resistance and enforce his claim.

We are of opinion that these instructions were at least sufficiently favorable to the defendant. The cases cited by his counsel show that if he had an irrevocable license to enter, he would not be liable in an action of trespass *quare clausum* for an entry, if he could make it without opposition or resistance; but the authorities are clear that if resisted, he had no right to enforce his claim by a breach of the peace. *Sampson v. Henry*, 13 Pick. 379; *Commonwealth v. Haley*, 4 Allen, 318; 3 Bl. Com. 4. If it be assumed, therefore, that the defendant had an irrevocable license to enter the plaintiff's premises, yet, upon being resisted, it was his duty to desist from his attempt to enter, and resort to his legal remedies. He cannot justify a resort to personal violence to enforce his rights.

*S. W. Bowerman*, for defendant.

*M. Wilcox*, for plaintiff.

*Exceptions overruled.*

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**FLORENCE SEWING MACHINE COMPANY V. GROVER AND BAKER SEWING MACHINE COMPANY.**

(110 Mass. 70.)

THE judgment of the Supreme Judicial Court of Massachusetts in this case was affirmed by the Supreme Court of the United States, and the opinion of the latter court was printed in full, as a note to *Beery v. Irick*, 12 Am. Rep. 545. It is, therefore, not deemed necessary to do more here than to refer to the latter opinion. The point decided was, that a suit in a State court, in which a citizen of the State is plaintiff, and a citizen of the State and a citizen of another State are defendants, cannot be removed on the petition of the citizen of the other State into a United States Circuit Court, under the United States Statutes of 1867, chap 196, as a whole suit; nor can it be so removed, as far as relates to the petitioning defendant, at least if the cause of action is not so divisible that the suit can proceed separately against each defendant in the different courts.

## GAFFNEY V. HAYDEN.

(110 Mass. 127.)

*Infant — contract of. for service.*

**An infant who has contracted with manufacturers to work for them for three years can avoid the contract, and sue on a *quantum meruit*.**

**CONTRACT** for work and labor performed by the plaintiff during the months of April and May, 1870. Writ dated October 5, 1871. Trial at June term, 1872, of the Superior Court, before BRIGHAM, C. J., who, after a verdict for the plaintiff for \$37.52, allowed the following bill of exceptions.

“The plaintiff was a minor at the time of the trial. He testified that he went into the employ of the defendants in January, 1870, and left May 19, 1870; that he left for no other cause than that he did not like the work, and could earn more elsewhere; that all the work he did for the defendants was piece-work; that the work was grinding bibbs, and he was to have nine cents for all bibbs ground by him which passed inspection; that he knew there was an inspector, and that he could get no pay except for such pieces as passed inspection; that he entered into the employment as aforesaid, and signed a written contract with the defendants,” a copy of which was made part of the bill of exceptions, and by which he agreed to work for the defendants for three years from January 1, 1870, at brass finishing, and to do such kinds of work as they might see fit to furnish, and the defendants agreed to pay him the same as they paid others for the same kind of work; “that immediately he had his choice between day work and piece-work, and chose piece-work, and always did it while he remained with the defendants; that his services were worth to the defendants \$1.50 per day, for the time he worked, and for which he had not been paid; that he worked thirty-five days, but all these days he was at piecework as aforesaid, and never did any day-work for the defendants.

“One Chamberlin, called as a witness by the plaintiff, testified that the services of an ordinary grinder, of the plaintiff’s experience, were worth \$1 per day; but that such services would be worth

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Gaffney v. Hayden.

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nothing at piece-work more than the amount of pieces that passed inspection; and that what did not pass inspection had to be sent back to be recast or refitted, and would be of no value until it did so pass inspection. The plaintiff offered no evidence to show that any of his work passed inspection.

"The defendants introduced evidence of their paymaster and their pay roll, by which it appeared that \$3.65 was the total amount of the plaintiff's work which passed inspection during the period in controversy; that the amount which passed inspection was returned by the inspector and credited to the different parties; that the plaintiff's work had been returned in this manner, in January, February and March, and the plaintiff had drawn and received his compensation, so returned and made up, to wit: \$14, \$17 and \$35, respectively, and had signed receipts therefor.

"The overseer in the room where the plaintiff worked testified that all of his work which passed inspection was returned into the office and appeared upon the pay roll, that it was injurious to the defendants to have the plaintiff terminate his contract as he did; that the early months of an inexperienced workman are worth but little at any kind of the work of such a manufactory; that, taking into consideration the injury caused by the plaintiff's leaving as he did, the defendants had paid him all his services were worth; that the services of a grinder of the same experience and qualifications as the plaintiff would be worth 75 cents to \$1 per day; and that he had charge of the plaintiff's work during the time in question, and did not notice any less efficiency or faithfulness than in the former months. This was all the evidence upon the questions raised by this bill.

"The defendants requested the judge to rule, 1. That the action could not be maintained under the declaration; 2. That there was no evidence of the value of the plaintiff's services except the value of the piece-work; 3. That the plaintiff could not recover for the value of the piece-work except that which passed inspection, unless the work was unfairly rejected; 4. That if the jury believed that the plaintiff's services were worth no more than the amount that passed inspection, then that he could recover only for that amount; 5. That there was no evidence that more than \$3.65 worth passed inspection; 6. That the jury had a right to consider the injury to the defendants by reason of the sudden termination of the contract.

"The judge ruled otherwise upon all the aforesaid prayers, except the fourth, which he gave. As to the sixth, he gave the following instructions: 'The plaintiff is entitled to recover such sum for his services as he would be entitled to if he had entered into no express contract for his labor, and the defendants cannot set off against such sum any damages they may have sustained by the plaintiff's avoidance of his express contract, or reduce that sum below the actual value of his services because he left the defendants' employ before the time specified in the written contract; but in determining the value and gain of the plaintiff's services to them, the loss which the defendants received in consequence of the plaintiff's inexperience and leaving their service sooner than he gave them reason to expect, may be considered as reducing the value of that service to the amount which the plaintiff had received from the defendants. The practical question is what, upon the whole, considering the defendants' gain and loss from the plaintiff, indicates the worth of the plaintiff's service.' To all which the defendants excepted."

*G. M. Stearns and M. P. Knowlton, for defendants.*

*G. D. Robinson, for plaintiff.*

MORTON, J. This is an action of contract to recover for work and labor performed by the plaintiff for the defendants in the months of April and May, 1870. The plaintiff is a minor. It appeared at the trial that he went into the employment of the defendants in January, 1870, under a special contract to work for three years; that his work was "grinding bibbs;" that he agreed to work by the piece and was to receive nine cents for each bibb which passed inspection; and that he left in May, 1870. The defendants put in evidence to show that the work of the plaintiff which passed inspection during the time covered by the writ, was only \$3.65, and claimed that he could recover only that amount. The court ruled in effect that the plaintiff could avoid his express contract and recover upon a *quantum meruit*. If this ruling was correct, the accompanying instructions were sufficiently favorable to the defendants. In *Moses v. Stevens*, 2 Pick. 332, the subject was carefully considered, and the court held that a special contract by a minor for his services was voidable, and that, upon avoiding



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it, he might maintain an action upon a *quantum meruit*, and recover a reasonable compensation for his services, as though no such contract had been made. In *Stone v. Dennison*, 13 Pick. 1, the minor, with the concurrence of his guardian, had made a contract to remain in the service of the defendant until he should arrive at the age of twenty-one years, for his board, clothing and education. The court held that the case was not within the general rule that a minor cannot bind himself by his contracts, for want of legal capacity, but that the contract was for necessities, and being shown to be beneficial to the minor, he could not avoid it after it was fully executed on both sides. In *Vent v. Osgood*, 19 Pick. 572, it was held that the contract of a minor to perform a whaling voyage was voidable, that it was avoided by his desertion during the voyage, and that he could recover a *quantum meruit* for his services.

The case at bar falls within the principle of *Moses v. Stevens*. The contract which the defendants seek to make binding upon the plaintiff is merely an executory contract for the plaintiff's services. The law gives him the privilege of judging whether it is beneficial or not, and of avoiding it if he so elect. Having avoided it he is entitled to recover a *quantum meruit*, in the same manner as if he had worked for the defendants without any contract between them.

The defendants rely upon the case of *Breed v. Judd*, 1 Gray, 455. But that case is entirely unlike the case at bar. The substance of the contract was that the defendants were to furnish an outfit to the plaintiff to go to California; that the plaintiff was to furnish his labor and time; and that of the fruits of the enterprise two-thirds were to belong to the plaintiff and one-third to the defendants. The contract was fully executed on both sides; the plaintiff had sent forty-two ounces of gold dust to the defendants, being one-third of the avails of his labor, and, after he became of age, he brought this suit to recover the value of said gold dust less the amount of the outfits expended on his account. The court considered that the plaintiff, under the privilege of infancy, could have avoided his contract while it remained executory, but decided that the effect of avoiding it, after it was executed, was not to change the relations of the parties, and to enable him to recover of the defendants as his own the third part which had vested in them as their proportion of the joint adventure. The contract was shown to be a beneficial one. Whether, if it had been a hard one.

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he could recover such share of the proceeds as would be a reasonable compensation for his labor, did not arise, and was not considered.

Upon the whole, a majority of the court is of opinion that the rulings of the presiding judge in this case were correct.

*Exceptions overruled.*

### KENNEDY V. SHEA.

(110 Mass. 147.)

*Seduction — relation of master and servant. Evidence.*

In an action for seducing the plaintiff's daughter, it appeared that she was employed by a third person, but that the plaintiff required her to spend a part of every Sunday at home, and that while there she did work for him. *Held*, that she was his servant, so that he could maintain the action.

At the trial of an action for seducing the plaintiff's daughter, the admission of evidence that she worked for her father after the seduction furnishes the defendant no ground of exception, if the judge instructed the jury that the plaintiff could not recover unless the relation of master and servant existed between him and his daughter at the time of seduction.

It is no objection to the maintenance of an action for seducing the plaintiff's daughter, that the sexual intercourse between the daughter and the defendant was had by force.

At the trial of an action to which the statute of limitations was a bar, unless the defendant had been away from the State between two or three years, a witness for the plaintiff testified that the defendant was away "two, three or four years, I could not exactly say how long." The defendant introduced no evidence as to the time of his absence. *Held*, that the jury were warranted in finding that the case was taken out of the statute of limitations.

TORT by trustee process for seducing Mary Kennedy, the plaintiff's minor daughter. Writ dated September 18, 1870.

At the trial in the Superior Court, before PUTNAM, J., the plaintiff introduced evidence tending to show that in January, 1862, his daughter was living in the family of one Warner, at Springfield, under a contract made with her "that she should receive for her services \$1.50 per week; that she should have a part of Sundays for herself; that if she went out on Sundays in the morning, she was to be back at three o'clock, and if she went in the evening, she was to be back at ten o'clock; that she was to have two evenings each week

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to go where she pleased, and that her wages were to be paid her once a month, and she was to keep a part to buy clothes for herself, and to give the rest to her mother ;" that upon these evenings and Sundays she was accustomed to go to the plaintiff's house, and to assist sometimes in the family, just as she saw fit and with her own assent ; that the plaintiff required her to spend a part of the Sunday at home, while he was at church ; that she used to cook the dinner on Sundays and do work about the house ; and that all the sexual intercourse she ever had with the defendant occurred while she was living at Mr. Warner's, under this arrangement.

The plaintiff was allowed, against the defendant's objection, to introduce evidence tending to show that Mary Kennedy lived in the plaintiff's family and did work there for about two weeks, in September, 1862, a short time before the birth of the child which was begotten by the defendant, and some months after she had completed her service at Mr. Warner's, and that the child was born in Washington, September, 1862, and the plaintiff had no knowledge of his daughter's pregnancy until some time after its birth.

Mary Kennedy, who was the only witness regarding the acts of intercourse between her and the defendant, testified that he had connection with her three times in January and February, 1862 ; that each of these times he "forced" her ; and that she did not remember any other times when he had connection with her.

The plaintiff contended that the defendant had been absent from the Commonwealth long enough to take the case out of the statute of limitations. The only evidence on that point came from Mary Kennedy, and was as follows : " I came back from Washington to Springfield about two years after the child was born. The defendant was here at that time. Afterward I knew the defendant was not here ; I cannot tell how long he stayed away, nor when he left ; I had a talk with him about a week before our last trial," which was in the winter of 1871. " He said he had been out west, and that he was very sorry he returned, for he could have done better out there ; I should think he was gone away two, three or four years ; I could not say exactly how long."

The defendant requested the judge to rule " that upon the evidence the action could not be maintained, because there was no relation of master and servant between the plaintiff and his daughter ; that if she was out at service with another person, that would preclude the plaintiff from recovering, although the contract was

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for his benefit; that if the plaintiff required service of her on Sundays, it did not affect the case if she was in fact under another master; that if the jury believed that the sexual intercourse relied upon was accomplished by force and violence, this action could not be maintained; that under the evidence the offense was not seduction; but an assault and battery, and so was barred by the statute of limitations; that, for the same reason, the action could not be maintained under the trustee process, and that there was no evidence to take the case out of the statute of limitations."

The judge refused so to rule, and instructed the jury "that in order to maintain this action, the relation of master and servant must have existed between the plaintiff and his daughter at the time the defendant debauched her; but that if, by the contract with Warner, she was to have a part of Sundays and two nights in the week for herself, then her father would have the right to require her to serve him on those occasions, she being a minor, and if he did require it on such occasions, then the relation of master and servant existed sufficiently to entitle him to maintain this action; that it was immaterial if the defendant effected the criminal connection complained of forcibly, in the manner which Mary Kennedy testified to; that the plaintiff must satisfy them that the defendant had been absent from and resided out of the Commonwealth a sufficient length of time, so that the remaining time since the cause of action accrued, up to the commencement of this suit, would not exceed six years, and that there was evidence upon that point for their consideration."

The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

*G. M. Stearns and M. P. Knowlton, for defendant.*

*G. Wells and N. A. Leonard, for plaintiff.*

AMES, J. In order to maintain an action of this description, the plaintiff is required to prove that the relation of master and servant between himself and his daughter existed, either in fact or constructively, at the time of the seduction. According to numerous decisions of the courts of New York, Pennsylvania, and some other States of our Union, this relation is sufficiently proved by evidence that the daughter was a minor, and that the father

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had a right to her services. Those decisions also lay down the rule that the effect of such evidence is not impaired by the fact that at the time of the injury she was not living in her father's family, but was in the actual employment of another person. It was held that such a fact would not justify the inference that the father had abandoned any of his paternal rights, unless the daughter had been actually bound out as an apprentice. In other words, the relation results constructively from his right to reclaim the custody of her person, from his responsibility for her education, and from his obligation to support her if she should become sick or disabled while so absent from her home. *Martin v. Payne*, 9 Johns. 387; *Nickle-son v. Stryker*, 10 id. 115; *Clark v. Fitch*, 2 Wend. 459; *Bartley v. Richtmyer*, 4 Comst. 38; *Mulvehall v. Millward*, 1 Kern. 343; *Horn-keth v. Barr*, 8 Serg. & Rawle, 36; *Vanhorn v. Freeman*, 1 Halst. 322; *Mercer v. Walmsley*, 5 Har. & J. 27. With regard to her earnings, the privilege allowed to her to retain a portion of them in her own hands, in order to purchase clothing, must be considered as permissive only. There is nothing in the report inconsistent with an absolute right on the part of the father to terminate her engagement with her employer, and to require her at any moment to return to his own house. As against the excepting party, it is to be presumed that he offered to prove every fact that he was in a condition to prove, having a tendency to disprove the existence of the relation of master and servant between the plaintiff and his daughter. There having been no attempt to prove the contrary, it may be assumed that she had never been emancipated from the paternal control, and that her father was entitled to her earnings, so that she was *de jure* his servant. So far as the American authorities go, therefore, the plaintiff has done all that was incumbent upon him in this part of the case.

The rule adopted in the English courts apparently requires that the relation of master and servant should be proved with greater strictness where the daughter does not reside under the paternal roof; and according to *Thompson v. Ross*, 5 H. & N. 16, the action cannot be maintained if, at the time of the seduction, she was a domestic servant in a family other than that of her father. But it is well settled, even under the English rule, that the amount and value of the actual service to the father are of but little importance, and that any service, however slight, is sufficient. *Bennett v. Allcott*, 2 T. R. 166. It is enough if the father had a

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right to her services, and if some service was rendered. The case finds that he was entitled to her services a portion of every week, and that she was actually employed on Sundays at his house, in cooking and other domestic work, upon his requirement. If so, her entire service did not belong to her employer, Warner, and the action could well be maintained even under the English decisions. See judgment of BRAMWELL, B., in *Thompson v. Ross*, *ubi supra*.

The evidence which was admitted under objection, as to the fact that the daughter lived and rendered services in her father's family, for about two weeks, several months after the seduction, although perhaps open to objection as immaterial, cannot have had any effect upon the verdict, and does not have any bearing upon the plaintiff's right to recover. The jury were instructed that the relation must be proved to have existed at the time of the seduction.

As the gist of the action is the debauching of the daughter, and the consequent supposed or actual loss of her services, it is immaterial to the plaintiff's claim under what special circumstances the injury was wrought, or whether it was accompanied with force and violence or not. The action will lie, although trespass *vi et armis* might have been sustained. It would be no defense that the crime was rape and not seduction. *Furman v. Applegate*, 3 Zab. 28. The father in such cases may always seek his remedy in an action on the case. *Bennett v. Allcott*, *ubi supra*; *Chamberlain v. Hazelwood*, 5 Mees. & Wels. 515; 2 Greenl. Ev., § 571.

As to the statute of limitations, there was evidence to the effect that the defendant had been absent from the State for years after the cause of action accrued. The number of years was not stated by the witness with precision, the expression being two, three or four years. As the defendant himself must have had knowledge on this subject; and made no attempt to show what the exact number of years was, it was evidence proper to be laid before the jury. It is impossible to say that there was no evidence on the subject.

*Exceptions overruled.*

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King v. Donahue.

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**KING V. DONAHUE.**

(110 Mass. 185.)

*Evidence — of handwriting.*

A party to an action is not entitled to write his signature in the presence of the jury for the purpose of being compared with a signature purporting to be his, the genuineness of which he denies.

WRIT of dower by the widow of Patrick King. At the trial in the Superior Court, before ROCKWELL, J., the tenant introduced in evidence a deed releasing dower, which purported to be signed by the demandant. The demandant, being called as a witness, testified that the deed was a forgery. She thereupon wrote her name in the presence of the jury, seven or eight times in succession, upon a slip of paper, and offered to submit it to the jury for the purpose of having it compared by them with the signature to the deed, as evidence that that signature was not genuine. The tenant objected, but the judge allowed the paper to be submitted to the jury.

The demandant also offered in evidence her signatures upon the pay-roll of the Albion Paper Company, by whom she had been employed from eighteen months to two years prior to the trial (such signature being made at the end of every month during that time), for the purpose of letting the jury compare them with the signature to the deed. The tenant objected, but the judge admitted the evidence.

The jury returned a verdict for the demandant, and the tenant alleged exceptions.

*G. Wells and N. A. Leonard & H. Morris, for tenant.*

*M. P. Knowlton and G. M. Stearns, for demandant.*

AMES, J. Upon the question whether the genuine signature of the demandant had been subscribed to the instrument purporting to contain her release of the right of dower, she was not to be confined in her testimony to a mere general denial. She was entitled to whatever benefit could be derived from a comparison of the dis-

puted signature with her genuine and unquestioned handwriting. For that purpose, she would be allowed to produce original letters or other documents, admitted or proved to bear her genuine signature, in order that the jury might make the comparison. But we do not find any case in which signatures made for the purpose of being examined have been so admitted. *Stanger v. Searle*, 1 Esp. 14; *Keith v. Lothrop*, 10 Cush. 453. Lord KENYON gave as the reason for the exclusion of such evidence, in the first of these cases, that "the party might write differently from his common mode of writing his name, through design;" and the like reason was given by Lord DENMAN in *Doe v. Newton*, 5 Ad. & El. 514. It is suggested in the argument that this consideration affects the weight of the evidence rather than its competency. The rule, however, seems to be that a signature made for the occasion, *post litem motam*, and for use at the trial, ought not to be taken as a standard of genuineness, and that the jury should not be troubled with the additional issue or question whether the signature so offered is written in a constrained and forced manner or not. In the language of COLERIDGE, J., in *Doe v. Suckermore*, 5 Ad. & El. 703, 705, "the test of genuineness ought to be the resemblance, not to the formation of the letters in some other specimen or specimens, but to the general character of writing, which is impressed on it, as the involuntary and unconscious result of constitution, habit, or other permanent cause, and is therefore, of itself, permanent. And we best acquire a knowledge of this character, by seeing the individual write at times when his manner of writing is not in question, or by engaging with him in correspondence; either supposition giving reason to believe that he writes at the time, not constrainedly, but in his natural manner." In *Doe v. Newton*, 5 Ad. & El. 514, it was held that no documents could be made use of for the purpose of effecting a comparison of this kind, except such as were already in evidence for other purposes of the cause. With us the rule is less strict, and it is enough to say that the disputed writing is not to be tested by comparison with any but an admitted or proved fair specimen of the natural and habitual handwriting of the party. There are cases to the effect that where a witness has denied his signature to a document, he may be called upon in cross-examination to write his name in open court, in order that the jury may compare such writing with the controverted signature; but this is merely as a part of the cross-examination, and for the purpose of contradicting the



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*Pease v. Allis.*

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witness. *Doe v. Wilson*, 10 Moore's P. C. 502, 530; *Chandler v. Le Barron*, 45 Me. 534; Taylor on Ev., § 1669.

The demandant's signatures to receipts for her wages, upon the pay-roll, were properly admitted; but it was an error upon the part of the presiding judge to allow her signature made at the trial to go to the jury. Upon this ground the

*Exceptions are sustained.*

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**PEASE V. ALLIS.**

(110 Mass. 187.)

**A wife is not a competent witness to her husband's will.**

**APPEAL** by the person named as executor in an instrument purporting to be the will of William S. Allis, from a decree of the Probate Court, disallowing the instrument as the will of William S. Allis. At the hearing, before AMES, J., it appeared that one of the three witnesses to the instrument was the wife of William S. Allis. The judge reported the case for the determination of the full court "upon the question of law involved; if the wife was a competent witness, the will to be admitted to probate; otherwise, the appeal to be dismissed, and the decree of the Probate Court affirmed."

*G. Wells* and *N. A. Leonard*, for appellant.

*M. P. Knowlton* and *G. M. Stearns*, for appellee.

CHAPMAN, C. J. By the Gen. Stats., chap. 92, § 6, a will must be subscribed by three or more competent witnesses. They must be competent at the time of the attestation of the will. By the common law, it was a settled principle that husbands and wives could not in any case be admitted as witnesses for or against each other, independently of the question of interest. None of our statutes have changed the rule in this respect as to the attestation of wills, and the rule applies to such attestation. *Davis v. Dinwoody*, 4 T. R. 678; *Hatfield v. Thorp*, 5 B. & Ald. 589; *Sullivan v. Sullivan*, 106 Mass. 474.

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As the wife of the testator in this case was not a competent witness when the will was executed, his death did not make her competent.

*Decree affirmed.*

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**MERRIFIELD V. CITY OF WORCESTER.**

(110 Mass. 210.)

*Water-course — pollution by sewage.*

If the water of a stream becomes polluted by the emptying into it of city sewers, so that a riparian proprietor cannot use it in his business as he has been before accustomed to do, he cannot recover against the city for the pollution, so far as it is attributable to the plan of sewerage adopted by the city; but he can recover for it so far as it is attributable to the improper construction or unreasonable use of the sewers, or to the negligence or other fault of the city in the care or management of them.

**TORT.** The declaration alleged that the plaintiff was seized and possessed of a lot of land on both sides of Mill brook, so called, in Worcester, with a machine shop thereon, fitted up with a large steam engine and boilers for the purpose of furnishing steam power to the tenants of his said machine shop; that he had a right to have the water of the brook flow pure and uncorrupted, such water in a pure condition being absolutely essential to the carrying on of his works; that the defendants, on April 5, 1861, and on divers days and times since, “wrongfully and unjustly cast, carried and deposited, and caused to be cast, carried and deposited into said Mill brook and the waters thereof, at points in the channel thereof above and higher than the works of the plaintiff, great quantities of filth, dirt, gravel, refuse material, matter discharged from sewers, privies, water-closets, stables, sinks and streets, and divers other noxious materials and ingredients,” by reason of which the water became greatly corrupted and unfit for use in the plaintiff’s business, “said water so corrupted, among other things, corroding the plaintiff’s boilers and engine and fixtures, causing an adhesion of sediment and other materials to said boilers, and greatly increasing the expense of making the necessary amount of

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steam for said works, and greatly increasing the danger of explosion in said boilers, and causing thereby frequent breakages in the engine, fixtures and works, and deterioration thereof, and causing great expense in the repair thereof and in the interruption to the running of the works, thereby causing great injury to all of the plaintiff's establishment;" and that "the waters of the brook so corrupted are thereby rendered so offensive that it is difficult and expensive to procure competent engineers and workmen to operate said works."

At the trial in this court, the case, which is stated in the opinion, was reserved by CHAPMAN, Ch. J., for the determination of the full court. If the court should be of opinion that the plaintiff was entitled to recover upon the case reserved, or any part thereof, the case to be sent to assessors to assess the damages sustained by the plaintiff, if any, upon such rules and instructions as the court should give; otherwise, judgment to be rendered for the defendants.

*P. E. Aldrich*, for plaintiff, cited *Merrifield v. Lombard*, 18 Allen, 16; *Wesson v. Washburn Iron Co.*, id. 95; *Wheeler v. Worcester*, 10 id. 591; *Goldsmid v. Tunbridge Wells Improvement Commissioners*, L. R., 1 Ch. 349; *Attorney-General v. Metropolitan Board of Works*, 1 Hem. & Mil. 298; *Attorney-General v. Council of Borough of Birmingham*, 4 K. & J. 528; *Oldaker v. Hunt*, 6 DeG., M. & G. 376; *Attorney-General v. Leeds Co.*, L. R., 5 Ch. 583; *Spokes v. Banbury Board of Health*, L. R., 1 Eq. 42; *Lingwood v. Stowmarket Co.*, id. 77; *Wood v. Sutcliffe*, 2 Sim. (N. S.) 163; *Angell on Wat.* (6th ed.), § 136; *Kerr on Inj.* 382.

*G. F. Hoar* and *T. L. Nelson*, for defendants, cited *Boston and Roxbury Mill Co. v. Newman*, 12 Pick. 467; *Hildreth v. Lowell*, 11 Gray, 345; *Wellington, petitioner*, 16 Pick. 89, 97; *Flagg v. Worcester*, 13 Gray, 601; *Callis. on Sew.* 80; *Woolr. on Sew.* 1; *Jacob's Law Dict.*, Tit. "Sewer."

WELLS, J. The plaintiff sues for an alleged violation of his rights as a riparian proprietor upon a small natural stream running through the city of Worcester near its center. The injury complained of is that of polluting its water, so as to render it unfit for mechanical and other uses, to which he has been accustomed to apply it. He alleges generally that the defendant, in 1861, and

on divers days and times since, has cast, and caused to be cast, carried and deposited into said brook, above the plaintiff's works, "great quantities of filth, dirt, gravel, refuse material, matters discharged from sewers, privies, water-closets, stables, sinks and streets, and divers other noxious materials and ingredients." The declaration does not set out the particular grounds upon which it is proposed to hold the municipal corporation responsible for these torts. The city would not be liable to an action for such direct acts of wrong, whether done by individual citizens or by its own officers, without proof of some special authority to do the acts, unless they resulted from, or were connected with, the exercise of some proprietary right by the city. *Oliver v. Worcester*, 102 Mass. 489, 497. From the report, we infer that the ground of liability is that the dirt, filth and other materials were carried into the stream by means of certain drains or sewers constructed under authority therefor conferred upon the city council by the charter, Stats. 1848, ch. 32, § 14; 1866, ch. 199, § 30, and by the general laws; Stat. 1841, ch. 115; Gen. Stats., ch. 48, § 3.

The Stat. of 1867, ch. 106, authorized the taking of Mill brook and the entire diversion of its waters from the channel by which it passes the plaintiff's works. So far as he has suffered damage from any proper exercise of the power and rights conferred by that act, he must seek his remedy by a different proceeding from this, under the special provisions of the act itself. But the stream had not been so diverted at the time when this action was brought, and it does not appear that the injuries complained of were the result of any proceedings under that act. The allegations also cover a long period prior to its adoption.

It appears that in 1850, more than twenty years before the date of the writ in this case, a drain or sewer was constructed, by order of the city council, discharging from Thomas street into Mill brook, a short distance above the works of the plaintiff. This drain extended back to, and ran a short distance along, Main street. In 1857, and at various times subsequently, this drain has extended farther along Main street; and drains running along several other streets have been connected with it. The plaintiff contends that the injurious effects of the drainage into the brook have thus been constantly increasing, down to the time of action brought. This question, so far as material, it is agreed, shall be submitted to assessors, if in any aspect of the case the plaintiff is entitled to

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have his damages assessed. The case, then, presents the question, upon what grounds, and to what extent, a city is responsible in damages for such effects produced by its system of drainage, or by the manner in which its drains are used and managed.

The right, of which the plaintiff alleges a violation, is not that of acquired property in possession. It is not an absolute right, but a natural one, qualified and limited, like all natural rights, by the existence of like rights in others. It is incident merely to his ownership of land through which the stream has its course. As such owner he has the right to enjoy the continued flow of the stream, to use its force, and to make limited and temporary appropriation of its waters. These rights are held in common with all others having lands bordering upon the same stream; but his enjoyment must necessarily be according to his opportunity, prior to those below him, subsequent to those above. It follows that all such rights are liable to be modified and abridged in the enjoyment, by the exercise by others of their own rights; and, so far as they are thus abridged, the loss is *damnum absque injuria*. The only limit that can be set to this abridgment, through the exercise by others of their natural rights, is in the standard or measure of reasonable use. *Gould v. Boston Duck Co.*, 13 Gray, 442; *Haskins v. Haskins*, 9 id. 390; *Tourtellot v. Phelps*, 4 id. 370, 376; *Thurber v. Martin*, 2 id. 394; *Pitts v. Lancaster Mills*, 13 Metc. 156; *Wadsworth v. Tillotson*, 15 Conn. 366; *Springfield v. Harris*, 4 Allen, 494.

So the natural right of the plaintiff to have the water descend to him in its pure state, fit to be used for the various purposes to which he may have occasion to apply it, must yield to the equal right in those who happen to be above him. Their use of the stream for mill purposes, for irrigation, watering cattle, and the manifold purposes for which they may lawfully use it, will tend to render the water more or less impure. Cultivating and fertilizing the lands bordering on the stream, and in which are its sources, their occupation by farm-houses and other erections, will unavoidably cause impurities to be carried into the stream. As the lands are subdivided and their occupation and use become multifarious, these causes will be rendered more operative, and their effects more perceptible. The water may thus be rendered unfit for many uses for which it had before been suitable; but so far as that condition results only from reasonable use of the stream in accordance with the common right, the lower riparian proprietor has no remedy.

When the population becomes dense, and towns or villages gather along its banks, the stream naturally and necessarily suffers still greater deterioration. Roads or streets crossing it, or running by its side, with their gutters and sluices discharging into it their surface water collected from over large spaces, and carrying with it in suspension the loose and light material that is thus swept off, are abundant sources of impurity, against which the law affords no redress by action. *Flagg v. Worcester*, 13 Gray, 601; *Barry v. Lowell*, 8 Allen, 127; *Turner v. Dartmouth*, 13 id. 291.

Upon the case stated in the pleadings and report, we must assume that the plaintiff is able to show an appreciable detriment to his rights in the stream. That detriment consists in its unfitness for certain uses in his works upon the stream; whereby he is deprived of a capacity, incident to the ownership of his land, to make such use of its waters as they pass; or his right so to use them is impaired in value. At most, it is but the deprivation of that natural advantage, already impaired by other causes against which he has no redress. There is no allegation of damage to his property otherwise than by this deprivation; no allegation that a nuisance is created which injuriously affects his land or the occupation thereof.

It may readily be supposed that a small stream like Mill brook, with a considerable city like Worcester upon either bank, and the adjacent lands descending rapidly toward its bed, would cease to preserve its waters from impurity, and become valueless for any purpose except that of drainage and the creation of power by its head and fall. All this may result even though no unjustifiable act be done to effect it. To enable a riparian owner to maintain an action for damages, he must show, not only that the defendant has done some act which tends to injure the stream and which he has no legal right to do, or which is in excess of his legal right so as to be an unreasonable use thereof, but also that the detriment of which the plaintiff complains is the result of that cause. Where he can show an appreciable detriment to himself, and connect it with such wrong by another, he may recover the damages shown to be due to that wrong. *Merrifield v. Lombard*, 13 Allen, 16.

It was decided in *Child v. Boston*, 4 Allen, 41, that in the laying out of common sewers, that is, "in determining what drains should be built and where they should discharge," the duties of the aldermen (or mayor and aldermen) were of a quasi-judicial nature; that

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“they were required to act, not as agents of the city, or in any manner under the direction of the city, but as public officers.”

For the incidental disadvantage, loss or inconvenience necessarily resulting to individuals, in their rights of property, from such action; or from the execution of the work, in a proper and skillful manner, as so laid out; or from the maintenance and use of the drains in a proper and reasonable manner, without negligence in their care and management, no action of tort can be maintained against the city. This exemption of municipal bodies and their officers from liability, and corresponding subordination of individual rights and interests to the safety, health and welfare of the general public, is a principle of frequent application. *Baker v. Boston*, 12 Pick. 184; *Taylor v. Plymouth*, 8 Metc. 462; *Commonwealth v. Tewksbury*, 11 id. 55; *Commonwealth v. Alger*, 7 Cush. 53, 95; *Belcher v. Farrar*, 8 Allen, 325.

But, in the construction of works so laid out, the town or city is responsible that it be done in a proper manner, and with a reasonable degree of skill and care; and if, for want thereof, any unnecessary injury is caused to the property or rights of individuals, the town or city may be charged therewith in an action of tort. *Perry v. Worcester*, 6 Gray, 544; *Sprague v. Worcester*, 13 id. 193; *Emery v. Lowell*, 104 Mass. 13.

According to the rule laid down in *Child v. Boston* the city is also responsible for the proper care and management and reasonable use of drains established in accordance with the general provisions of the statutes, and liable in damages for injuries suffered by reason of negligence or other fault of the city, or its officers and agents having the charge thereof.

Whether the damage which the plaintiff has suffered is attributable in any degree to the improper construction or unreasonable use of the sewers, or to the negligence or other fault of the defendant in the care and management of them, is a question which does not appear by the report to have been tried. If it should be found to be so attributable, the action may be maintained; and this question must be first determined by the assessors provided for by the report, who are “to assess the damages sustained by the plaintiff, if any,” upon the rules and principles herein set forth.

*Assessors to be appointed.*

## FORD V. FITCHBURG RAILROAD COMPANY.

(110 Mass. 240.)

*Master and servant — action against corporation for negligence of co-servant — contributory negligence.*

One employed by a railroad corporation to drive a locomotive engine over its road may recover damages against the corporation for personal injuries caused by a defect in the engine, which was due to the neglect of the agents of the corporation charged with keeping the engine in proper repair, although the directors and superintendent had no reason to suspect negligence or incompetence on the part of such agents.

One employed by a railroad corporation to drive a locomotive engine over its road is not debarred from recovering damages against the corporation for injuries from an explosion caused by a defect in the boiler of the engine, by the fact that he was acting in intentional violation of the rules of the company, unless the accident was due, in whole or in part, to such violation; nor by the fact that such rules provided that the driver of an engine should be held responsible for the condition of his engine, must be sure that it was in good working order, and must immediately stop, draw his fire, station his signal men and procure assistance, whenever any defect was detected in an engine that would make it, in his judgment, unsafe to proceed; nor by the fact that he knew the engine was not in good working order, if he did not know and ought not to have known that it was unsafe.\*

TORT to recover for personal injuries occasioned by the explosion of the boiler of a locomotive engine belonging to the defendants.

The evidence on the part of the plaintiff tended to show that he was in the employ of the defendants as fireman, and afterward as engineer, from 1862 up to the time of the accident; that he ran on the engine "Wachusett;" that on March 25, 1870, he was ordered by the train dispatcher who had authority in that behalf to take the engine "Concord," that night. He took that engine and ran her to Fitchburg, but had discovered on taking her that "the throttle lever stem was out of order; it was hard to pull it open and to shut it off"; it grew worse until he could not shut off steam, except with the reverse lever. He notified the master mechanic that the throttle of the "Concord" worked hard and ought to be attended to. The master mechanic replied that the throttle had always worked hard; afterward at Fitchburg plaintiff took off the

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\* See *Fitch v. Boston and Albany R. R. Co.*, 13 Am. Rep. 545.



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Ford v. Fitchburg Railroad Co.

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dome cover and found that two of the stay-rods were broken; he ran the engine back to Boston, notified the master mechanic of the broken stay-rods, and wanted another engine but did not get it. He continued to run the "Concord" until it exploded a few days after.

The evidence tended to prove that the explosion was caused by an old crack in the boiler in such a position that it could not be detected without taking portions of the engine off. By the rules of the company, "enginemen are held responsible for the condition of their engines, and must be sure that they are in good working order before they are taken out of the engine house." Defendants' evidence was to the effect that neither the master mechanic nor any other agent of defendant had information or knowledge that the "Concord" was out of repair, or reason to believe that it was dangerous.

Several experts testified "that in their judgment the crack in the side sheet could not have been seen without removing the fire-box or crown bars; that the training which it appeared Cooledge had had would be the best training to make a man a competent master mechanic of a railroad; and that, in selecting a master mechanic, railroad companies do not usually regard it as necessary that the candidate should be a mechanic by trade."

It was admitted by the plaintiff that the "Concord" was originally a suitable and proper machine for the purpose for which it was designed.

At the close of the evidence, the defendants asked the judge to rule that there was no evidence to go to the jury in maintenance of the action; but the judge refused so to rule.

The defendants then asked the judge to give the following rulings: "1. The rules of the defendants, under which the plaintiff worked, constituted a part of the contract of his employment, and any intentional violation of any of them by him would deprive him of any rights arising from the relation in which he stood to the defendants, so long as such violation continued. 2. Under the rules of the defendants, which prescribed the duty and ascertained the rights of the plaintiff, in respect to the operation of his engine, he was the absolute judge of whether, at any time, the engine was safe to proceed, and was in good running order; and in respect to those questions was wholly independent of Cooledge or Maddox (master mechanic and foreman of the round-house), or any other

employee of the defendants. 3. If the plaintiff knew, or had reasonable cause to believe, the engine to be unsafe [or not in good working order], he cannot recover. 4. If the defendants used reasonable care originally in furnishing a suitable and safe engine for their road, and in putting the same into the hands of fit and suitable agents to be kept in repair, they are not liable in this action for injury caused by any defect or want of repairs therein subsequently existing. 5. The plaintiff's knowledge, as shown by the evidence in this case, of the defective condition of the engine, and his continuing to use the same after such knowledge, is conclusive evidence of a want of due care on his part. 6. The plaintiff's knowledge that the engine was not in good order, and his using the same with such knowledge, is conclusive evidence of want of due care on his part; and if such knowledge and such use by him is proved by the evidence, he cannot recover. 7. The defendants are not liable in this case unless the plaintiff proves that the president, directors or superintendent either personally knew, or, by the exercise of reasonable care in the performance of their duties, might have known of the existence of the defect in the engine, which caused the explosion; or unless the plaintiff proves that the president, directors or superintendent either personally knew, or, by the exercise of reasonable care in the performance of their duties, might have known, that the person or persons employed to have the charge of the engine and keep it in repair were incompetent; and further proves that such incompetency caused the accident. 8. If the plaintiff violated any of the rules, and the accident would not otherwise have happened, he cannot recover. 9. Although Cooledge and Maddox failed, through incompetency, to make such examination of the boiler as the bulge in the back head, the condition of the stay-rods or throttle reasonably called for, and although, had they made such examination, the cause of the accident would probably have been discovered and the same prevented, still the defendants are not liable on that account. 10. The master mechanic was a fellow-servant of the plaintiff, and the defendants are not liable for the negligence, if any, of the master mechanic in failing to keep the engine in repair."

These rulings the judge refused to give, except the third, which he gave, omitting the words in brackets.

The judge, at the request of the defendants, also gave the following ruling: "If the plaintiff ran the engine when it was not

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in good working order, knowing it to be such; and the particulars in which it was not in good working order were signs of a defective condition in the boiler, causing an explosion, by which the plaintiff was injured, and a competent engineer ought to have known that such particulars were signs of such defective condition, and the plaintiff held himself out as such a competent engineer when he entered into the employment of the defendants as an engineer, he cannot recover."

The judge instructed the jury as follows: "A person entering into the service of another takes upon himself, in consideration of the compensation to be paid him, the ordinary risks of the employment, including the negligence of his fellow-laborers." "The general rule is, that he who engages in the employment of another, for the performance of specific duties and services, for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such services, embracing perils arising from the negligence of those in the same employ as incident to the service." "When a master uses due diligence in the selection of competent and trustworthy servants, and furnishes them with suitable means to perform the service in which he employs them, he is not answerable to one of them for an injury received by him in consequence of the carelessness of another, while both are engaged in the same service." "A corporation is required to use due care in supplying and maintaining suitable instrumentalities for the performance of the work or duty which it requires of its servants, and is liable for damages occasioned by neglect or omission to fulfill this obligation, whether it arises from its own want of care, or that of its agents intrusted with the duty. But the law does not hold it responsible for the negligence of its servants, if of competent skill and experience, in using or managing the means and appliances placed in their hands in the course of their employment, if they are neither defective nor insufficient." "The rules of law are well settled that a servant, by entering into his master's service, assumes all the risks of that service, which the master, exercising due care, cannot control, including those arising from the negligence of his fellow-servants; but that the master is bound to use ordinary care in providing suitable structures and engines and proper servants to carry on his business, and is liable to any of their fellow-servants for his negligence in this respect. This care he can and must exercise, both in procuring and in keep-

ing and maintaining such servants, structures and engines. If he knows, or in the exercise of due care might have known, that his servants are incompetent, or his structures or engines insufficient, either at the time of procuring them or at any subsequent time, he fails in his duty. For the management of his machinery and the conduct of his servants, he is not responsible to their fellow-servants; but he cannot avail himself of this exemption from responsibility, when his own negligence in not having suitable instruments, whether persons or things, to do his work, causes injury to those in his employ. He cannot divest himself of his duty, to have suitable instruments of any kind, by delegating to an agent their employment or selection, their superintendence or repair. A corporation must, and a master who has an extensive business often does, perform this duty through officers or superintendents; but the duty is his and not merely theirs, and for negligence of his duty in this respect he is responsible. To hold otherwise would be to exempt a master, who selected all his machinery and servants through agents or superintendents, from all liability whatever to their fellow-servants, although he had been grossly negligent in the selection or keeping of proper persons and means for conducting his business.

“The obligation of a corporation, so far as respects those in its employment, does not extend beyond the use of ordinary care and diligence. By ordinary care and diligence is meant such as men of ordinary sense, prudence and capacity, under like circumstances, take in the conduct and management of their own affairs. This varies according to circumstances as the risk is greater or less, and must be measured by the character and risks and exposures of the business.”

Applying the law as stated to the present case, the judge instructed the jury that “the exercise of ordinary diligence and care was required on the part of the defendants, and their proper officers and agents, in providing a suitable engine to be used by the plaintiff upon their road, and in keeping the engine in proper condition for such use; that the plaintiff was also required to exercise ordinary diligence and care in the use of the engine and in avoiding danger therefrom; that if neither party was in fault, the plaintiff could not recover; that if the injury complained of was occasioned by the fault or negligence of both parties, the plaintiff was not entitled to recover; that if the defendants, acting by their proper

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officers and servants, exercised ordinary diligence and care in providing a suitable engine and in keeping the same in proper condition and repair, for the use to which it was appropriated, they were not responsible for the injury complained of; but that if they failed so to do, and the injury complained of resulted from their neglect in this respect, then the defendants were responsible therefor, unless it appeared that the plaintiff himself was also wanting in the exercise of ordinary vigilance and care, either in the management of the engine or in improperly exposing himself to danger therefrom, thereby rendering himself guilty of contributory negligence, in which latter case he was not entitled to recover; that the burden was upon the plaintiff to show, not only that the defendants were guilty of negligence in not exercising ordinary diligence and care in providing a suitable engine, and keeping it in proper condition, thereby causing the injury complained of, but that he was himself free from any negligence contributing to the injury; that Rule 28 did not, as a matter of law, release the defendants from their legal responsibility in this case, if any such existed, for the internal and invisible defects in the boiler, by which it was claimed the explosion was occasioned; and that the violation of Rule 42, so far as it stated it to be the duty of the plaintiff to be sure that the engine was in good working order before it was taken from the engine-house, did not, as matter of law, necessarily preclude him from recovering in this case, if otherwise entitled, unless the accident or injury complained of was occasioned in whole or in part by such violation."

The jury returned a verdict for the plaintiff, and the defendants alleged exceptions.

*H. B. Staples and F. P. Goulding*, for defendants. The repair of engines is a constant and necessary incident to the business of running a railroad, and the repair shop is as much an accessory of the enterprise as station-houses and switches. Negligence in keeping the engine in repair was negligence of a fellow-servant. To maintain that the servants of the corporation engaged in the constantly needed repairs upon engines are not fellow-servants of those engaged in running them, is to maintain a distinction impossible to apply in practice. The plaintiff himself sometimes worked on repairs. *Farwell v. Boston & Worcester Railroad Co.*, 4 Metc. 49; *Hayes v. Western Railroad Co.*, 3 Cush. 270; *King v. Boston & Worcester Railroad Co.*, 9 id. 112; *Gillshannon v. Stony Brook Railroad Co.*,

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10 id. 228; *Seaver v. Boston & Maine Railroad*, 14 Gray, 466; *Durgin v. Munson*, 9 Allen, 396; *Gilman v. Eastern Railroad Co.*, 13 id. 433; *Hackett v. Middlesex Manuf. Co.*, 101 Mass. 101; *Cooms v. New Bedford Cordage Co.*, 102 id. 572; *Hard v. Vermont & Canada Railroad Co.*, 32 Vt. 472; *McGlynn v. Brodie*, 31 Cal. 376; *Tarrant v. Webb*, 18 C. B. 797.

Any statements in *Snow v. Housatonic Railroad Co.*, 8 Allen, 441, and *Gilman v. Eastern Railroad Co.*, 13 id. 433, which tend to support the position taken by the plaintiff, are merely *obiter dicta*.

There was no evidence of general incompetency on the part of Cooledge or Maddox; certainly none to affect the defendants with knowledge of such incompetency. The construction which the defendants sought to put upon the rules was the correct one. A willful or negligent use of an engine in violation of the master's express directions deprives the servant of any remedy for an accident happening from such use. To knowingly use an engine defective, or not in good working order, is, of itself, a want of due care.

The plaintiff must show that the negligence of the defendants was the proximate cause of the accident. Negligence to do something which "would probably" have resulted in the discovery of the defect is not proximate. The crack could not have been discovered without a virtual destruction of the engine. On the uncontrolled evidence, every thing had been done to render the engine safe by proper examination and repair. The only signs from which it is even claimed that any further or different examination should have been instituted, were known equally as well to the plaintiff as to the agents of the defendants. The plaintiff was guilty of negligence in failing to inform Cooledge that he had procured an examination on the Wednesday before the explosion, and in failing to inform Maddox that experts had made the examination. If he had a right to rely upon their judgment, he was bound to fully communicate to them all he knew about it.

*G. A. Torrey*, for plaintiff.

COLT, J. This action is founded on the alleged negligence of the defendant corporation in failing to provide and keep in repair a safe and suitable engine to be run by the plaintiff in his employment as locomotive engineer upon its road. The law applicable to

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cases of this description, and which defines the rights and duties that belong to the relation of master and servant, is plainly stated in the recent decisions of this court. The principles are discussed and the cases sufficiently reviewed in *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572; 3 Am. Rep. 506, and in *Gilman v. Eastern Railroad Co.*, 10 Allen, 233, and 13 id. 433, and *Huddleston v. Lowell Machine Shop*, 106 Mass. 282.

Upon a careful consideration of the evidence and the instructions given, we find no error in law for which this verdict should be set aside. The legal principles which govern the case were accurately stated. They were well adapted to the whole evidence in its different aspects, and they were all that the case required. The jury, who are presumed to have been controlled by these instructions and the evidence before them, must have found, in arriving at their verdict, that the defendant corporation, by its agents intrusted with that duty, did not exercise ordinary care and diligence, in supplying and maintaining an engine, safe to be used for motive power upon their road, in the performance of that part of the plaintiff's work in which he was engaged at the time; that this neglect was the cause of the injury; and that the plaintiff was himself in the exercise of ordinary care and diligence, in the use of the engine, and in avoiding danger therefrom. They must have further found that the plaintiff did not know, or have reasonable cause to believe, that the engine was unsafe at the time of the explosion, and also that the injury was not, in whole or in part, caused by any violation of the terms of his contract of employment, as expressed in the rules of the road assented to by him.

This establishes the defendant's liability. It is enough that there was evidence in support of these several findings, sufficient to justify each. It is not a question of the weight of evidence, or whether the verdict ought not to be set aside on a motion for a new trial. When the question is raised by exceptions, the only inquiry is, whether there is any evidence proper to submit to the jury as having a tendency to support the legal propositions which charge the defendant with liability. *Forsyth v. Hooper*, 11 Allen, 419.

The rule of law which exempts the master from responsibility to the servant for injuries received from the ordinary risks of his employment, including the negligence of his fellow-servants, does not excuse the employer from the exercise of ordinary care in sup-

plying and maintaining suitable instrumentalities for the performance of the work required. One who enters the employment of another has a right to count on this duty, and is not required to assume the risks of the master's negligence in this respect. The fact that it is a duty which must always be discharged, when the employer is a corporation, by officers and agents, does not relieve the corporation from the obligation. The agents who are charged with the duty of supplying safe machinery are not, in the true sense of the rule relied on, to be regarded as fellow-servants of those who are engaged in operating it. They are charged with the master's duty to his servant. They are employed in distinct and independent departments of service, and there is no difficulty in distinguishing them, even when the same person renders service by turns in each, as the convenience of the employer may require. In one the master cannot escape the consequence of the agent's negligence if the servant is injured; in the other he may.

There was no error in refusing to instruct the jury as specifically requested. The first ruling asked would absolve the defendant from any duty to the plaintiff, in case of his violation of any rule which he had agreed to observe. Such violation would perhaps justify the defendant in putting an end to the relation, if it saw fit. But until so terminated, the defendant must be held to the legal responsibilities assumed.

The second instruction asked, as to the effect of the rules referred to, in imposing the sole responsibility upon the plaintiff, was not warranted by their true meaning. Rule 28 clearly refers to accidents on the road which would make it unsafe to proceed; and rule 42 imposes upon the engineer the duty of seeing that his engine is in good working order. The jury were told that the first of these rules did not relieve the defendant from responsibility for internal and invisible defects in the boiler, and that the last would not preclude the plaintiff from recovering, unless the injury complained of was occasioned, in whole or in part, by such violation; but that, if the plaintiff knew, or had reasonable cause to believe, the engine to be unsafe, he could not recover.

As to the third, fifth and sixth rulings asked, it is plain that the plaintiff's knowledge that the engine was not in good working order, and was to some extent defective, is not conclusive evidence of want of due care on his part. It was for the jury to consider on the question of the alleged contributory negligence of



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the plaintiff; and they were told that if the plaintiff ran the engine when it was not in good working order, knowing it, and knowing that its condition was a sign of the defect which caused the explosion by which he was injured, or when, as a competent engineer, he ought to have known it, he could not recover. The fact that it was in violation of an express rule is not material, unless such violation was a direct cause of the injury. *Clarke v. Holmes*, 7 H. & N. 937.

The fourth and seventh requests, so far as they differ from the instructions given, were deficient. The corporation is equally chargeable, whether the negligence was in originally failing to provide, or in afterward failing to keep, its machinery in safe condition. The duty is essentially the same, and no sound distinction can be established in favor of the defendant on this ground, and for the rest, the question was not whether the officers named knew, or might have known, of the defect, or of the incompetency of those who had charge of the repairs, but whether the corporation in any part of its organization, by any of its agents, or for want of agents, failed to exercise due care to prevent injury to the plaintiff from defects in the instrument furnished for his use.

The ninth and tenth instructions asked assume that the plaintiff's injury was caused by the incompetency of fellow-servants. But the action is for failing in the exercise of ordinary care to provide a suitable engine for his use in the work required. This involves an inquiry into the existence and character of the defect, the sufficiency of the means employed for its discovery and removal, the duties required of those charged with the work of providing and keeping in safe working order the motive power of the road, and the fidelity with which these duties were discharged. This all concerns the obligations imposed upon the master, and the jury may have found for the plaintiff without regard to the competency or incompetency, the care or the negligence, of the officers named. The instructions given were all that were required.

*Exceptions overruled.*

## HOWARD V. EMERSON.

(110 Mass. 330.)

*Sale — implied warranty.*

Upon the sale of a live cow by a farmer to retail butchers, there is no implied warranty that she is fit for food, although he knows that they buy her for the purpose of cutting her up into beef for immediate domestic use.

MORTON, J. This is an action of contract to recover the price of a cow sold by the plaintiff to the defendants. The jury have found that there was no express warranty in the sale. They found that there was no implied warranty, under the instructions given them by the court. These instructions were that, "if the plaintiff knew that the defendants wanted to purchase the cow for the purpose of immediately cutting it up into beef, for immediate domestic use, there would be an implied warranty that the cow was fit for that purpose." The only question before us is as to the correctness of these instructions.

The general rule of the common law is, that upon a sale of goods, if there is no express warranty of the quality of the goods sold, and no fraud, the maxim *caveat emptor* applies, and no warranty is implied by law. *Winsor v. Lombard*, 18 Pick. 57; *Mizer v. Coburn*, 11 Metc. 659; *French v. Vining*, 102 Mass. 132; S. C., 3 Am. Rep. 440.

The defendants contend that when articles of food are sold for immediate domestic use there is an implied warranty or representation that they are sound and fit for food, and that the case at bar falls within this exception to the general rule. *Van Bracklin v. Fonda*, 12 Johns. 468. But we think that this exception, if established, does not extend beyond the case of a dealer who sells provisions directly to the consumer for domestic use. In such cases it may be reasonable to infer a tacit understanding, which enters into the contract, that the provisions are sound. The relation of the buyer to the seller and the circumstances of the sale may raise the presumption that the seller impliedly represents them to be sound. But the same reasons are not applicable to the case of one dealer selling to another dealer; and we think the rule is settled that in the sale of provisions, in the course of general commercial transactions, the maxim *caveat emptor* applies, and there is no implied

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warranty or representation of quality or fitness. *Emerson v. Brigham*, 10 Mass. 197; *Winsor v. Lombard*, 18 Pick. 57; *Hart v. Wright*, 17 Wend. 267; *Wright v. Hart*, 18 id. 449; *Moses v. Mead*, 1 Denio, 378; *Burnby v. Bollett*, 16 Mees. & Wels. 644.

In the case at bar, the plaintiff was a farmer, and the defendants were butchers and dealers in provisions. The subject of the sale was a cow, which the defendants were to kill and prepare for market. It does not fall within the exception above stated as to the sale of provisions for immediate use as food.

The fact that the plaintiff knew the purpose for which the defendants purchased the cow would not render him liable, upon an implied warranty, for unknown defects which made her unfit for that purpose. A warranty of fitness may be implied in contracts to manufacture or in executory contracts to sell, but it is not implied in executed sales of specific chattels. *Chandelor v. Lopus*, 1 Smith's Lead. Cas. (5th Am. ed.) 238, and notes.

Whether, if the plaintiff knew of the unfitness and concealed it, he would be liable in an action of tort for fraudulent representations, we need not consider.

Upon the facts of this case we are of opinion that, there being no express warranty and no fraud, the law does not imply a warranty that the cow was fit to be killed for beef, and therefore that the instructions were erroneous.

*J. Hopkins*, for plaintiff.

*F. A. Gaskill* and *G. F. Very*, for defendants.

*Exceptions sustained.*

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(110 Mass. 389.)

*Promise — consideration.*

A consideration for a promise moving from the promisee to a third person, but unknown to the promisor, is insufficient to support an action on the promise.

CONTRACT. The declaration alleged that Edwin R. Paul made a promissory note dated May 2, 1870, payable on demand to the plaintiff, or order; "that said note was given to the plaintiff for a lot of standing wood which the plaintiff had bargained to said Paul,

but of which he had given him no bill of sale, or agreement in writing; that in July, 1870, said Paul had cut said wood and left it on the land of the plaintiff and was about to remove the same; that the plaintiff went to said Paul and informed him that he was going to stop said wood, which he designed to do, and demanded security for said note, which said Paul promised to give; that thereupon the plaintiff proposed to said Paul that he should have the defendant sign said note and give the defendant security, instead of giving it directly to the plaintiff, and if he would do so, said note could lie, and he would give him time thereon, and allow him to take off said wood; that said Paul accepted said proposition and agreed to get the defendant to sign said note; that thereupon said Paul went with the plaintiff to the defendant, and after a conversation between said Paul and the defendant, which the plaintiff did not hear, said Paul told the plaintiff that the defendant would sign said note; that thereupon the plaintiff presented said note to the defendant and the defendant wrote his name on the back of said note; that the plaintiff has given said Paul time on said note and allowed him to take off said wood as he agreed to do; that said Paul carried off and sold said wood but has neglected to pay said note; and that the defendant, though requested, has neglected to pay said note."

The answer denied all the allegations of the declaration, and further alleged that if the defendant put his name on the note, he did so long after it had been delivered to the plaintiff, and without consideration.

At the trial in the Superior Court, before PITMAN, J., the plaintiff testified that by an oral agreement he sold wood standing on his land to Paul on the day of the date of the note and took the note therefor; that in July, when the wood was all cut, and some of it had been taken from the land, he went to Paul and said, "I shall stop the wood if I do not get security," and proposed to Paul to get the defendant to indorse the note; that Paul said he would do so, and they went together to the defendant's shop; that Paul went in, stayed a quarter of an hour, and on coming out said the defendant would sign the note; that Paul did not go in again, but the plaintiff went in and the defendant wrote his name on the back of the note; that the plaintiff said, "Is that sufficient?" and the defendant said, "Yes, that will hold me;" and that Paul then carried off the wood. The defendant objected to the admission of so much of this testimony as related to the conversation between the

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plaintiff and Paul in the absence of the defendant, but the judge admitted it.

Paul and the defendant both testified that Paul said nothing to the defendant about signing the note; that no consideration was paid to the defendant for signing; that the defendant did not know that the plaintiff altered or was to alter his condition in any way on account of the defendant's having signed the note; and that the defendant was not made acquainted with any of the circumstances connected with the note.

The defendant asked the judge to rule that upon the evidence the plaintiff could not recover under the pleadings; "that if there was a sufficient consideration between Paul and the plaintiff, it would not be a sufficient consideration between the plaintiff and the defendant, unless the facts and circumstances were communicated to the defendant at or before the time he signed the note; and that the consideration of the plaintiff saying to Paul he would stop the wood unless Paul gave him security on the note, would not be a consideration between the plaintiff and defendant, unless the same was communicated to the defendant at or before the time he indorsed the note."

But the judge refused so to rule, and ruled "that it being admitted that the defendant put his name on the note after it was delivered to the plaintiff, and as no part of the original contract, he could only be held liable upon proof of some new and independent consideration; that this consideration need not move to the defendant, that is, it need not be any advantage or benefit conferred on him, but a loss or release of something on the part of the plaintiff would be enough; that if the plaintiff had a demand note upon which he had a present power to sue and attach property, and had upon his own premises a large quantity of wood which he might attach, and if he then gave Paul to understand that he should so attach and stop the wood unless he furnished the defendant's name on the note as security, and Paul thereupon agreed, in consideration that he would not prevent his carrying off the wood, to procure the defendant's name, and went with the plaintiff to the defendant and obtained the defendant's name on the note, and in consequence thereof the plaintiff did allow Paul to remove the wood, this would be a sufficient consideration to support this action."

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The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

*G. A. Somerby*, for defendant.

*W. Colburn*, for plaintiff.

GRAY, J. Upon the plaintiff's declaration and testimony, it appears that he had made an oral agreement with Paul for the sale of the standing wood, and that Paul had cut all the wood and removed some of it. The title to the whole wood had vested in Paul, with an irrevocable license to enter upon the plaintiff's land and carry away what remained thereon, and the plaintiff had no right by his own authority to forbid his doing so. *Nettleton v. Sikes*, 8 Metc. 34; *Hill v. Cutting*, 107 Mass. 596.

We have great doubts whether, upon the allegations in the declaration and the evidence introduced at the trial, it would be competent for a jury to find that the plaintiff informed Paul that he intended to resort to legal process for the collection of the note and the attachment of the wood. But we express no decisive opinion upon that question, because the declaration may be amended, if necessary, and the testimony may, perhaps, vary, at the new trial, which must be granted upon another ground.

The defendant, as the jury were rightly instructed, having put his name on the note after it had been delivered to the plaintiff, and not as part of the original contract, could not be held liable without proof of some new and independent consideration. That consideration need not be a benefit to the defendant. Any loss or disadvantage to the plaintiff, by giving up some right against a third person, or agreeing to abandon or delay enforcing some right against him, would be sufficient. But the consideration or motive of the promise must be known to the promisor. The minds of the parties must meet and agree upon the terms of the whole contract, including the promise on the one side and the consideration for it on the other. An agreement between the plaintiff and Paul, by which the former agreed to forbear to sue the latter, would not be a consideration for the defendant's promise, if not made at his request or communicated to him at or before the time of the making of his promise. *Tonney v. Prince*, 4 Pick. 385; S. C., 7 id. 243; *Stone v. White*, 8 Gray, 589.

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Keenan v. Southworth.

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It follows that the learned judge who presided at the trial erred in admitting evidence of conversations between Paul and the plaintiff, not proved to have been communicated to the defendant; in refusing to give the last instruction prayed for, and in the instruction given to the jury upon the same point.

*Exceptions sustained.*

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KEENAN V. SOUTHWORTH.

(110 Mass. 474.)

A postmaster is not liable for the loss of a letter occasioned by the negligence of his clerk.

TORT against the postmaster of East Randolph, to recover damages for the loss, by the defendant's negligence, of a letter addressed to the plaintiff. At the trial in the Superior Court, before PITMAN, J., the plaintiff introduced evidence, not now necessary to report, that the letter was received at the post-office at East Randolph, and was lost by the negligence or wrongful conduct of one Bird, who was the postmaster's clerk. The plaintiff having disclaimed "any actual participancy or knowledge of the acts of Bird on the part of the defendant," the judge ruled that the defendant was not liable for any careless, negligent or wrongful acts of Bird; and, by consent of the plaintiff, he directed a verdict for the defendant, and reported the case for the consideration of this court. If the ruling was wrong, the verdict to be set aside, and the case to stand for trial; otherwise, judgment for the defendant on the verdict.

*S. R. Townsend*, for plaintiff.

*B. W. Harris* and *P. E. Tucker*, for defendant.

GRAY, J. The law is well settled, in England and America, that the postmaster-general, the deputy postmasters, and their assistants and clerks, appointed and sworn as required by law, are public officers, each of whom is responsible for his own negligence only,

and not for that of any of the others, although selected by him, and subject to his orders. *Lane v. Cottor*, 1 Ld. Raym. 646, S. C., 12 Mod. 472; *Whitfield v. Le Despencer*, Cowp. 754; *Danlop v. Munroe*, 7 Cranch, 242; *Schroyer v. Lynch*, 8 Watts, 453; *Bishop v. Williamson*, 2 Fairf. 495; *Hutchins v. Brackett*, 2 Foster, 252.

The ruling at the trial was therefore right; and the plaintiff, having consented to a verdict for the defendant, reserving only the question of the correctness of that ruling, cannot now raise the question whether there was sufficient evidence of the defendant's own negligence to be submitted to the jury.

*Judgment on the verdict.*



CASES  
IN THE  
SUPREME COURT  
OF  
VERMONT.

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RICH V. BOLTON.

(18 Vt. 84.)

*Landlord and tenant — tenancy at will — notice to quit.*

Defendant went into possession of plaintiff's premises, with plaintiff's consent but without an agreement as to the time of holding or as to paying rent, and continued in possession fourteen years. He built a barn on the premises and repaired the house, but refused, when applied to, to pay rent. *Held* that defendant was not a tenant from year to year, and therefore not entitled to six months' notice to quit.

ACTION to recover possession of premises. Plaintiff's evidence tended to show that the premises in question had belonged to her for twenty-five or thirty years; that in April, 1857, defendant went into possession thereof, with her consent, without any bargain as to the time he was to remain or the price of rent; that the first year defendant built a small barn on the premises and repaired the house; that plaintiff could get nothing out of defendant for rent; that she tried to settle with him two or three years before the suit, but could get nothing but the repairs. Plaintiff gave defendant notice to quit on the 27th of May, 1871, and commenced this action June 14, following. The court, at the

trial, held that the tenancy was from year to year, and that defendant was entitled to six months' notice to quit, and rendered judgment of nonsuit. Plaintiff excepted.

*Henry Heywood*, for plaintiff.

*Rau & Drew*, for defendant.

REDFIELD, J. Did the occupancy of the premises by the defendant create such a relation to the plaintiff, that he is entitled, before suit, to six months' notice to quit? The defendant went into possession with the plaintiff's consent, but with no agreement as to paying rent. He built a barn on the premises, and repaired the house. The plaintiff testified that she tried to settle with him, but could get nothing of him but the repairs. From this statement it would seem that he declined and refused to settle and pay rent. After such refusal, he could not claim that, by his continued occupancy, his estate had become enlarged by reason of an implied liability to pay reasonable annual rent. These repairs, if made in compensation for the use, were not a payment of a yearly rent, but rather payments in gross, for the whole occupancy.

In *Roe ex. d. v. Lees*, 2 W. Bl. 1173, DEGREY, Ch. J., said that "all leases for uncertain terms are, *prima facie*, leases at will; it is the reservation of annual rent that turns them into leases from year to year." In *Richardson v. Taugridge*, 4 Taunt. 128, it was held that the letting of a shed to be used as a stable, for the dung or compensation, created a tenancy at will, and not from year to year, because there was no reservation of rent referable to a year, or any aliquot part of a year. In *Jackson ex. d. v. Bradt*, 2 Caines, 169, KENT, J., said: "The reservation of annual rent is the leading circumstance that turns leases for uncertain terms into leases from year to year." The same learned jurist stated the rule, in *Jackson ex. d. v. Rogers*, Caines' Cases in Error, 314, and in his commentaries, 4 Kent's Com. 113. In 1 Washb. Real Prop. 382, it is stated that "an agreement to pay rent, on the part of the tenant, is regarded as an essential element of a tenancy from year to year, and the time at which it is payable must have reference to a yearly holding, such as by the year, or some aliquot part of a year." This element of annual rent will be found in each case cited in behalf of the defendant. *Barlow v. Wainwright*, 22 Vt. 88; *Silsby v. Allen*, 43 id. 172. In *Doe d. Price v. Price*, 9 Bing. 356, the

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defendant had been let into possession without special agreement as to rent, and had been permitted to occupy and crop the land for fifteen years. The plaintiff required him to settle and pay what he owed him, or quit the premises. It was held, TINDAL, Ch. J., giving the opinion, a tenancy at will, and that the notice determined the will. See cases cited in *Chamberlain v. Donahue*, 45 Vt. 50.

This case has none of the distinctive features of a tenancy from year to year, except the long acquiescence in the defendant's occupancy. We think, in directing a verdict for the defendant for the want of six months' notice to quit, there was error. There are several reported cases which maintain that a tenant at will even, is entitled to six months' notice to quit. *Parker v. Constable*, 3 Wils. 25; *Jackson v. Bryan*, 1 Johns. 322; *Jackson v. Laughhead*, 2 id. 75; *Jackson v. Wheeler*, 6 id. 271; PUTNAM, J., upon *Ellis v. Page*, 1 Pick. 43, reported 2 id. 71, note. The learned judge, in the latter case, states the proposition, that the occupant for an indefinite time, with the consent of the owner, is entitled to six months' notice to quit, and cites many authorities. Of these cases, those from Keilw. 65; Brooke's Abr. 53; Viner's Abr. Est. B. 3; Com. Dig. Estates, x 9; and *Layton v. Field*, 3 Salk. 222, were each determinations in regard to well-defined tenancies from year to year. Those from Keilw. 162; Year Books, 35 x. 6, 24, 1348; 14 & 16 x. 8, 13; and from 10 Vin. Abr. 406, were upon the question of the right of the tenant to the emblements. *Right v. Darby*, 1 T. R. 159; *Shore v. Porter*, 3 id. 13; *Regge v. Bell*, 5 id. 471; *Martin v. Watts*, 7 id. 83; *Timmins v. Rowilson*, 3 Burr. 1603, and *Rising v. Stannard*, 17 Mass. 282, will be found on examination to be, all of them, cases where *annual* rent was reserved. And most of the case in which PUTNAM, J., gave the opinion, *supra*, arose under the statute of frauds, which declared certain parol leases to be, in effect, leases at will only. And the courts were called upon to determine whether the rights (notice to quit, among others) which tenants under the common law had acquired, by occupation and payment of rent, were taken away by the statute.

And what is said in most of these cases, in respect to tenancies at will, is with reference to tenancies declared to be such by the statute, but which had grown into tenancies from year to year, by occupation and paying rent. In these cases the courts felt constrained to protect tenants from violence and wrong, by allowing the equitable right of notice to quit, in cases, notwithstanding the

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statute, where, in favor of tenants, such right had become engrafted at common law.

The English rule seems to be well established, that in tenancies at will, which are so in fact, and not in name merely, as declared by the statute, six months' notice to quit is not required. *Right v. Beard*, 13 East, 210; *Knight v. Quigley*, 2 Camp. 505; *Hollingsworth v. Stennett*, 2 Esp. 717; 1 Washb. Real Prop. 349. But in all cases of this kind there must be such notice as determines the will of the landlord, and a reasonable notice; and where emblements are in question, such notice as shall protect the tenant in his rights. 1 Smith's Lead. Cas. \* 76. No question of the right of the tenant to emblements arises in this case; and, as the case is presented, the defendant seems to have had all the notice that he was entitled to. *Chamberlain v. Donahue*, *supra*.

The right of the tenant, occupying by the consent of the owner, to gather what he had sown, as implied by such consent, was thoroughly engrafted into the common law of England; and when the statute of frauds declared certain parol leases, tenancies at will, the courts wisely maintained the common-law right of the tenant to reasonable notice, and where parol leases had become essentially tenancies from year to year, to six months' notice to quit. But this right was maintained by the courts, as a shield to the tenant, and not a sword wherewith to defy the just rights of the landlord to claim his own.

*Judgment reversed, and cause remanded.*

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MONTGOMERY V. EDWARDS.

(46 Vt. 151.)

*Statute of frauds—effect of—parol evidence of contracts within—waiver of objection to.*

A contract within the statute of frauds is not illegal, but only not capable of being proved by parol, an immunity which may be waived by the one sought to be bound.

On the trial of an action brought on a contract within the statute of frauds, parol evidence of the contract was given by the plaintiff, the defendant raising no objection until the testimony on both sides was in, and the argument to the jury had commenced. *Held*, that it was then too late to take the objection, and that it must be considered as waived.

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**ASSUMPSIT** for breach of a contract, whereby, in consideration that plaintiff would permit the defendant to raise oats on a certain piece of plaintiff's land, defendant would seed down the land, fix the fences, etc. The contract was by parol, and only parol evidence of it was offered at the trial, which was received without objection. After the evidence was closed on both sides and the arguments to the jury had commenced, the defendant's counsel requested the court to rule that the plaintiff was not entitled to recover because the contract was not in writing. The court refused so to rule, to which defendant excepted.

*B. N. Davis*, for defendant.

**BARRETT, J.** It is not the province of this court to reverse the judgment of the County Court, unless the exceptions show error in that judgment.

The case shows that the defendant, on the trial, "admitted the making of the agreement, in nearly the same terms charged in the declaration." He was defending on the ground that he had performed on his part, according to said agreement. The parol evidence of the agreement given by the plaintiff had been received without objection. Not till "the arguments were partly concluded," did the defendant's counsel make any point on the fact that the agreement was not in writing. This was quite too late to be available after the admission of the agreement, voluntarily made, and without protest, by the defendant, on the trial and in open court.

A contract within the statute of frauds is not illegal, but only not capable of being enforced against the defendant without writing — an immunity which he may waive if he sees fit. *Browne on Frauds*, 484. The statute does not interfere with the substance of the contract, but throws a difficulty in the way of the evidence. **BENNETT, J.**, 14 Vt. 446. It should seem that the provisions of the statute only affect the rules of evidence, and not those of pleading. 1 Chit. Pl. 304. In *Adams v. Patrick*, 30 Vt. 520, the language quoted from *Browne*, *supra*, is adopted. As this view is effectual against the exception taken in the County Court, the judgment is affirmed.

*Judgment affirmed.*

## DAVENPORT V. HUBBARD.

(46 Vt. 200.)

*Judgment — recovery of, on contract — when no bar to action for breach of contract.*

Defendant contracted to do certain work for plaintiff, by a certain time, for a fixed price. He sued plaintiff for the price, and had judgment by default. *Held*, that such judgment was no bar to an action by plaintiff against defendant to recover damages for failing to complete the work within the time fixed.

*Semble*, it would have been otherwise had the judgment been recovered upon *quantum meruit*.

ASSUMPSIT for damages for breach of contract whereby the defendant agreed to dig a cellar, and lay a cellar wall for plaintiff, at a certain agreed price, to be completed by a certain day limited — breach, failure to complete within the time.

Defendant proved that after he had completed the work he brought an action against the plaintiff to recover a balance due under the contract; that he recovered judgment therein and recovered the amount of the judgment. Said recovery was for the full amount of the contract, deducting payments which had been made.

The court decided that said judgment was a bar to this action, and plaintiff excepted.

*J. A. Allen & Edwards and Dickerman, for plaintiff.*

*Belden & Ide, for defendant.*

Ross, J. [After deciding an unimportant question of practice.] This brings us to the principal question in the case. What effect is to be given to the prior judgment, by which the defendant, after the completion of the work on the cellar, recovered by default, and collected of the plaintiff, the balance of the price contracted to be paid for doing the work? Did such recovery defeat the plaintiff's right to recover damages sustained by him from the failure of the defendant to complete the work within the time limited by the contract, and from the unskillful manner in which the work was

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performed? The court held that the judgment in favor of the defendant, and the payment thereof by the plaintiff, were a bar to the plaintiff's right of recovery. The payment by the plaintiff of the defendant's judgment appears to have been compulsory. There are no facts stated in the exceptions, which tend to show it was a voluntary payment, and as such would affect the plaintiff's right to recover in this case. It is evident that the plaintiff's causes of action are not barred on the ground that they were adjudicated to the defendant's suit, in the sense that they were therein tried. In that suit the defendant sued for and recovered the full price stipulated in the contract to be paid for the work, deducting what had been previously paid. In no way were the plaintiff's alleged causes of action necessarily involved in the trial of the issue presented by the defendant in his suit. There is a class of cases in which a party seeks to recover for work done and materials furnished, in regard to which no price has been agreed upon between the parties. In such cases, the workman recovers upon *quantum meruit*, and of necessity must show what he reasonably deserves to receive, under all the circumstances, for his labor and materials. Any failure of the workman properly to perform the work, and any damage to the employer from known unskillfulness in its performance, is involved in the determination of the issue presented by the plaintiff. A failure by the employer when sued, to show the damages sustained by him from any known unskillfulness or improper performance of the work, would bar him from again litigating, in a suit in his own favor, in regard to such damages. But where the price to be paid for the work, or for an article sold with warranty, was agreed upon, it was, for a time, a disputed question in the common-law courts of England, whether the employer or purchaser could, in defense, or in reduction of the contract price, show that the work had been improperly or unskillfully performed, or that the article purchased did not answer the warranty. It was finally resolved that the employer or purchaser, if he had received no benefit, might show such matters in defense of an action by the workman or vendor; but if he had received some benefit the workman or vendor must recover, and the employer or purchaser resort to a separate action for negligence or false warranty. *Basten v. Butler*, 7 East, 479, and notes. It was not held by that court, so far as we are aware, that the employer or purchaser must, when sued by the workman or vendor, show such matters in defense or be barred from all remedy. This court has

allowed a defendant, when sued for the price of a horse sold with warranty, to show a breach of the warranty in reduction of the price. *Walker v. Hoisington & Harding*, 43 Vt. 608. It has not as yet decided that a defendant must show, when sued for the price, such matters, if known to him, in reduction, or he thereby loses all right to recover for the breach of the warranty. It would operate as a hardship upon the purchaser, to be always bound to do so. It would limit the extent of his recovery for the breach of warranty or of the contract, to that part of the price which remained unpaid — often a very inadequate remedy — unless he plead it in set-off. A plea in set-off sets up an independent cause of action, and may be used or not, as a defense, at the pleasure of the defendant. If he forbears to use it, his right to establish his claim by a separate action is not, as a general thing, impaired. “The essential difference between recoupment and reduction on the one hand, and set-off on the other, is, that in set-off, the ground taken by the defendant is, that he may owe the plaintiff what he claims, but a part or the whole of this debt is paid, in reason and justice, by a distinct and unconnected debt which the plaintiff owes him.” 2 Pars. on Cont. 247. It is sometimes difficult to discriminate set-off from reduction or recoupment. The former bears so close analogy to both of the latter, and is often so mingled with them by the facts of a case, as to render it difficult to determine in which form the opposing demand should be brought against the plaintiff's claim. A defendant may generally reduce the plaintiff's claim, by all just demands and claims owned by him, and payments made by him arising in the very same transaction, or, sometimes, in other closely connected transactions. So far as the reduction is a payment, or grows out of, and is directly connected with, the very claim which the plaintiff seeks to recover, it ordinarily is barred by the plaintiff's recovery. But, when the claim of the defendant is for a breach of a stipulation in the contract other than, and independent of, the one relied upon by the plaintiff, we are not aware of any authority which holds that he is barred from prosecuting his claim in an independent action, if he fails to avail himself of it as a defense to the plaintiff's suit. We think he is not barred, for the reason that his claim may exceed that of the plaintiff, so that he could not have a full remedy by way of reduction or recoupment; and by set-off, he might be deprived from securing only so much of his claim as might happen to be due from him to



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the plaintiff. In speaking of matters to be shown in defense, the term *recoupment* is often used as synonymous with *reduction*. The term is of French origin, and signifies cutting again, or cutting back, and, as a defense, means the cutting back on the plaintiff's claim by the defendant. Like reduction, it is of necessity limited to the amount of the plaintiff's claim. It is properly applicable to a case where the same contract imposes mutual duties and obligations on the two parties, and one seeks a remedy for the breach of duty by the second, and the second meets the demand by a claim for the breach of duty by the first. 2 Pars. on Cont. 247. Doubtless the same matter may sometimes be used as a defense in recoupment or in set-off, as the exigencies of the case may require. When it could be used in set-off, what has been said on the subject of set-off is applicable to claims of a nature suitable to be used in recoupment. It might be less expensive and tend to decrease litigation to hold, in all cases where the defendant may have a full remedy by using his claim in reduction, recoupment, or set-off, that he must avail himself of one of these methods of defense, and that his failure to do so should bar him from prosecuting his claim in a separate action. This could not be held on the ground that the claim of the defendant was, in fact, adjudicated in the plaintiff's suit, except in the cases heretofore named, but on the ground that he had had an opportunity to litigate his claim, and public policy required that he should avail himself of it. It may be questioned, however, whether much would be gained in the decrease of litigation; whether courts would not be as much occupied in determining whether the defendant had reason to believe he could have had a full remedy for his claim in using it as a defense, as they would in trying his claim in a separate action. In most cases, when he can do so with safety, a defendant is more than willing, is even anxious, to avail himself of all his resources to defeat the plaintiff's claim, if but in part. When the defendant's claim is not involved in the trial of the issue presented by the plaintiff's suit, but is in character a set-off, although he might use it as a defense in reduction or recoupment, we think, upon authority and principle, he has, and ought to have, the right to forego the use of it as a defense, without prejudice to his right to prosecute it in a separate action. In the case at bar, the claims sought to be enforced by the plaintiff, although arising under the same contract under which those enforced by the defend

ant's suit arose, are other than, and independent of, the issue involved in the trial of the defendant's suit. We think they were neither adjudicated nor barred by the judgment in the defendant's suit. We are aware there is quite a large class of cases in which it has been held that a recovery, by the vendor, of the contract price of goods sent or manufactured in answer of an order, is a bar to a subsequent suit by the purchaser for the recovery for defects in the goods which were known by the purchaser to exist at the time of the recovery by the vendor. These cases stand upon the principle that the purchaser, by allowing the recovery in favor of the vendor, waived all claim arising from any failure of the goods to answer the order, of which he had knowledge at the time of such recovery. In such cases, the purchaser is barred from prosecuting the vendor for such a known failure in the goods, by his conduct, the same as he is when, knowing that the goods are not such as he ordered, he keeps and uses them; and not because his claim of damages for such failure in the goods was adjudicated in the vendor's suit for the recovery of the contracted price. By allowing the vendor to recover the contract price he as effectually accepts the goods, and waives all known defects in them, as he does by keeping and using them. Most of the cases cited by the counsel for the defendant are of this class, and not applicable to the case at bar. Courts, in deciding such cases, have not always been careful to state the exact ground on which they are a bar to a subsequent suit in favor of the purchaser, and have sometimes used language which would convey the impression that the purchaser's claim of damages, for a failure of the goods to answer the order, was adjudicated in the suit for the recovery of the contract price. The case of *Gilson et al. v. Bingham*, 43 Vt. 410, strongly urged as an authority for the defendant, and which seems to have been misunderstood by some of the profession, belongs to this class. As is said by Judge REDFIELD in the opinion, the plaintiffs in that case, upon the authority of many well-considered cases, could be held to have waived their claim of damages for defects in the hearse, by receiving and keeping it after they were aware that it did not, in all particulars, answer the contract. They thereby accepted the hearse as a fulfillment of the contract. The plaintiffs' acts in paying the \$200, and in allowing the defendant to recover by default, in Franklin county, \$10, the balance of the contract price, were a complete waiver of their right thereafter to pursue the defendant for such failures in

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the hearse as were known by them to exist at the time of the recovery by the defendant. The plaintiffs were barred or estopped from pursuing the defendant, by their acts, and not because their claim for damages, occasioned by the failure of the hearse to answer the contract, had been adjudicated in the defendant's suit. Their conduct in these respects was as complete an acceptance of the hearse as a fulfillment of the contract for its manufacture, and a waiver of all known defects, as receiving and keeping it after the defects were known to them would be, and stands, substantially, upon the same ground. The plaintiffs' claim of damages for defects exceeded \$10; but, as is well said by Judge REDFIELD, and as was held by Judge WHEELER on the trial in the county court, as we are informed by him, the plaintiffs had, by the voluntary payment of \$200, limited their claim of damages for defects in the construction of the hearse to \$10. Hence, the plaintiffs' suit in that case appears to have been for the recovery back of the same \$10 which they had allowed the defendant to recover by default in the suit in Franklin county; while in fact the plaintiffs' suit was brought for the recovery of damages sustained by them from a failure of the hearse to fulfill the contract, and the defendant's suit was for the recovery of the balance of the price agreed to be paid for the manufacture of the hearse. We do not think that case, or the class of cases to which it belongs, in principle, identical with, or applicable to, the case at bar. Judge REDFIELD appears to have been of this opinion, as he held that *Gale v. Cooper*, 11 Vt. 597, and *Carver v. Adams*, 28 id. 500, were not applicable to *Gilson et al. v. Bingham*, because they involved the question of set-off.

*Judgment reversed, and cause remanded.*

## WOODWARD V. BARNES.

(48 Vt. 332.)

*Husband and wife — liability of husband for torts of wife.*

An action will not lie against husband and wife jointly for those torts of the wife which are founded on her contract.

CASE against Merritt Barnes and wife to recover the value of certain goods sold and delivered to the wife by the plaintiff. The declaration alleged that plaintiff was induced to sell and deliver the goods by the false and fraudulent representations of the wife that she and her children were in destitute circumstances, and were not provided with the necessaries of life, and that she was in need of said goods for use and consumption by herself and her children.

The defendant demurred to the declaration on the ground that the fraud therein alleged was part of the alleged contract of the said wife. The court sustained the demurrer, and plaintiff excepted.

*H. R. Start, for plaintiff.*

*H. S. Royce, for defendant.*

ROCK, J. This action is brought to compel payment for certain goods sold and delivered to the defendant Merritt Barnes' wife. It is admitted in the declaration that the husband, before the sale and delivery of the goods, had given the plaintiffs notice not to sell and deliver goods to his wife; and that he had, at all times, furnished her and her children with the necessaries of life, agreeably to her and their station, or the means or money wherewith to procure the same.

It was held in the suit between the plaintiffs and the husband, 43 Vt. 330, that, to entitle the plaintiff to recover for goods sold and delivered to the wife and children of the husband after they had been forbidden by the husband from selling and delivering goods to them on his credit, they must show that the articles were suitable to the husband's circumstances in life, and were needed for the then present use of his family for their reasonable clothing.

sustenance and comfort, according to his rank and condition in life, and that the husband had so far neglected his duty in this respect as to make it necessary for some one else to supply his family with such necessities. The plaintiffs now seek to avoid the effect of that rule, by proof that the goods were procured upon the false and fraudulent representations of the wife that they were so needed. We do not think this can be done. The rules of evidence affecting the liability of the husband are the same as they would be in an action *ex contractu*. The principle applies that has always been applied in actions against infants. In those cases it has been held that a plaintiff could not convert an action founded on a contract into a tort so as to charge an infant. *Jennings v. Randall*, 8 T. R. 335; *West v. Moore*, 14 Vt. 447; *Merrill v. Aden*, 19 id. 505. Hence the cause of action stated in the declaration does not entitle the plaintiffs to a judgment.

There is another ground why we think the action cannot be sustained. The general principle, that, for the torts or frauds of the wife, an action may be sustained against her and her husband, applies only to torts *simpliciter*, or cases of pure, simple tort, and not where the substantive basis of the tort is the contract of the wife. It was so held in *Liverpool Adelphi Loan Association v. Fairhurst et ux.*, 9 Exch. 420, and in *Keenan v. Hartman*, 48 Penn. 497. The substantive basis of the tort complained of here is, that by the false and fraudulent representations of the wife they were induced to sell and deliver the goods to her. But for the sale and delivery of the goods the plaintiffs would have had no legal cause of complaint. So that the plaintiffs' right of recovery is made to depend upon the question whether any such sale and delivery was made, and this clearly brings the case within the rule above stated.

*Judgment affirmed.*

## SHAW v. HALLIHAN.

(48 Vt. 202.)

*Husband and wife — torts of wife — conversion of property.*

A husband is liable jointly with the wife, at the suit of an administrator, for the wife's tort in wrongfully disposing of the effects of the intestate whether before or after letters of administration were granted.

CASE by William G. Shaw, administrator of John Gordon's estate, against James Hallihan and wife, to recover for property and money of the intestate, alleged to have been wrongfully disposed of by the wife.

The evidence tended to show that said Gordon went to defendant's house to board in 1868, carrying with him a bed and other property; that he became ill while there and died; that during his sickness Mrs. Hallihan tended and cared for him, and looked after his business, and had access to his pocket-book; that prior to his death, she, at his request, drew from the bank \$400 of his money, some of which was paid out by him before he died; that at the time of his death said articles of property were in the defendants' house, and were still there at the time of trial; that on the night of the intestate's death, Mrs. Hallihan took all of his money into her possession; that she paid out some of it for the intestate's funeral expenses, and kept the rest in her possession; that after the plaintiff's appointment as administrator, and before the commencement of this suit, the plaintiff called at the defendants' house, informed them of his appointment, and demanded whatever property the intestate left. Upon this point the plaintiff testified as follows:

"I went to the door and met this Mrs. Hallihan in the front hall, and her husband came into the front hall with her. I asked her if Mr. Jordan died there, and she said he did. I asked, I think, how long he was sick, and she said four or five weeks. Then I told her I had been appointed as administrator to look up his affairs, and that I came up to demand whatever property he had there that was left. I said that if there were any claims, they would all be adjusted against his estate in the proper way, but it was my duty to collect together the property. She said in the first

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place that there wasn't any thing of his there. I asked her if there wasn't any money. She said she didn't know any thing about any money, and she was very cross, and repelled all my inquiries. She stood in the door-way, so that I didn't go in any further than just at the front door. She denied knowing any thing about any money, and then said I, 'Didn't he have some household effects?' She said, 'I don't want to talk with you any more; I don't know any thing about his property.' Said I, 'Didn't he have a bed and some bedding?' 'Yes,' said she, 'he had a bed.' I asked her if he had any more things, and she said she wouldn't answer any more questions, and turned away from me. Her husband volunteered to say something in connection with the matter while we were talking; but she told him to shut up his head, it wasn't any of his business; and he subsided."

The plaintiff also introduced evidence tending to show that the plaintiff's attorney made demand of both the defendants for the property and money, before the commencement of this suit, and that Mrs. Hallihan refused to deliver the same; that on this occasion Mrs. Hallihan was loud and boisterous, and, when her husband attempted to speak in the matter, told him to shut his head, and called him an old fool. This suit was brought to recover for the property and money aforesaid. When the plaintiff rested, the defendants' counsel claimed that, upon the proof, the plaintiff was not entitled to recover, and the court, at the April term, 1873, PIERPOINT, Ch. J., presiding, so read, *pro forma*, and directed a verdict for the defendants; to which the plaintiff excepted.

*Wm. G. Shaw* and *H. H. Talcott*, for plaintiff.

*Henry Ballard* and *E. R. Hard*, for defendants.

WHEELER, J. The husband is liable with the wife for her torts, but she is not liable for his torts, unless they are her torts also. This action being against both husband and wife, for tort, can only be maintained for some tort of the wife. The conversion of property to use merely by the wife is to the use of the husband, and not of herself. Salk. 114; 2 Wms. Saund. 47 i. The mere detention of property wrongfully by her is not her tort, but her husband's. 2 Greenl. Ev., § 647. This appears from the fact that the action of *detinuit*, the gist of which was wrongful detention,

could be maintained against the husband only. 1 Ohit. Pl. 83; Bac. Ab., tit. Detinue, A. Where the conversion is by destruction of the property by her, she may be held with her husband. *Keyworth v. Hill*, 3 B. & Ald. 685; 2 Roper on Husb. & Wife, 77. Or by consumption by her; as, "suppose she were to take my sheep and eat them." Buller's N. P. 46. According to these principles the wife cannot be held liable for the articles of specific property nor for the money merely detained and kept from the plaintiff by the defendants. But the appropriation or payment of money, as it had on ear-marks, and circulates as currency, would be equivalent to destruction or consumption of it in respect to the person entitled to it. Such disposition of it could be made by the wife independently of the husband, and, if unlawful, would constitute a tort of hers, for which both would be holden. The evidence in this case tended to show an appropriation and payment by the wife of money left by the intestate at his decease, and that she paid part of it for the funeral expenses. Probably it was unavoidably necessary for the husband to provide for the burial of the body of the intestate, being at his house, as there was no administrator to do it in proper season, and there appears to have been no relative who would do it. The expenses of the burial would constitute a claim, preferred above all others, against the estate. Gen. Stats., ch. 53, § 84. But the defraying of them out of the effects would, at common law, make the person so meddling an executor *de son tort*. Bac. Ab., tit. Exrs. & Adms. B. 3. And it would be wrongful and remain so, unless the person should become executor or administrator rightfully. 2 Redf. on Wills, ch. 1, § 2, and note 6. The liability of an executor *de son tort* was enforced by suit against him as if he was rightful executor. The system of settling estates by proceedings in the probate courts in this State has so superseded common-law remedies as to prevent maintaining actions against executors or administrators, otherwise than to enforce the proceedings in the probate court. *Boyden v. Ward, admr.*, 38 Vt. 628. Perhaps a common-law action could not be maintained any more against a wrongful than against a rightful executor; and so there may not be any remedy against a person who wrongfully intermeddles with the effects of a deceased person other than by action in favor of the proper executor or administrator when appointed. 2 Redf. on Wills, ch. 1, § 2, note 6. But that question is not material, nor passed upon now. It seems to be settled that any one wrongfully disposing of such effects,



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before or after letters testamentary or of administration, is liable to an action therefor by the executor or administrator when appointed. Plow. 275; Toller on Exrs. 48; *Manwell, admr. v. Briggs*, 17 Vt. 176. Hence, the defendants may be held liable, as well for the money paid by the wife for funeral expenses of the intestate as for that appropriated by her otherwise.

The *pro forma* judgment of the county court is reversed, and the cause remanded.

*Judgment reversed.*

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SHATTUCK V. HAMMOND.

(46 Vt. 468.)

*Evidence in action for criminal conversation.*

In an action for criminal conversation the defendant may prove, in mitigation of damages, the plaintiff's criminal connection with other women at any time after marriage and before trial.

CASE for criminal conversation with plaintiff's wife. The plaintiff's testimony tended to establish the charge. Defendant denied the charge, and, among other things, offered evidence that after the commencement of the action the plaintiff had had illicit intercourse with one Martha Church. This evidence was excluded, and defendant excepted.

*Paul Dillingham and H. S. Royce*, for defendant. The testimony offered to show that the plaintiff took a woman to St. Johns, in April, 1867, and there had illicit intercourse with her, was clearly admissible in mitigation of damages. 1 Phil. Ev. (4th Am. ed.) 181, note; *Smith v. Mastin*, 15 Wend. 270; *Calcraft v. Harborough*, 4 C. & P. 499; Sedgw. on Dam. 120; Hill. on Rem. Torts, 398; *Foley v. Peterborough*, 4 Doug. 294; *Bromley v. Wallace*, 4 Esp. 237; *Traverse v. Borger*, 24 Barb. 614; 1 Selw. N. P. 24; Buller's N. P. 296; *Hodges v. Windham*, Peake's Cases, 39; *Elsam v. Faucett*, 2 Esp. 562; 4 N. H. 501; *Foot v. Tracy*, 1 Johns. 46.

*E. R. Hard, J. W. Stewart and E. J. Phelps*, for plaintiff.

BARRETT, J. Of the several points of exception that were taken on the trial in the county court, and have been argued in this court, only upon one do we find occasion to reverse the judgment, though on the others there was not entire concurrence of views. We think the exception was well taken to the exclusion of the testimony offered to show the conduct of the plaintiff with Martha Church. It would seem that the same principle that accords to the plaintiff the right to show, in aggravation of damages, his rank and quality would entitle the defendant to show the *same* in mitigation. It would be but bringing him to the test of a scale that is graduated both ways from the *zero* of indifference. If his rank marks *plus* with reference to that point, he has the benefit in due proportion; if *minus*, he should, by the same rule and reason, be subjected to the resulting disadvantage in like proportion. In 2 Stark. Ev., part IV, 442, it is said that "evidence in aggravation usually consists in showing the rank and quality of the plaintiff, etc. Id. 443, the case of *Wyndham v. Lord Wycomb*, 4 Esp. 16, and *Sturt v. Marquis of Blandford*, are cited, in which it was ruled by Lord KENYON that the fact of the plaintiff's connection with other women, after his marriage, might be proved in bar. But in *Bromley v. Wallace*, id. 237, Lord ALVANLEY ruled that it was to be considered in mitigation of damages, and not in bar of the action. What was held in the case last cited is the true doctrine, shown (Buller's N. P. 27) to have been held and promulgated very early; and by the more recent text-books and cases, it is shown to be firmly established, and to have been decisively administered. 1 Phil. Ev. (4th Am. ed.) 181, note; 2 Greenl. Ev., § 56; KENT, Ch. J., in 1 Johns. 51; RICHARDSON, Ch. J., 4 N. H. 501. In *Smith v. Masters*, 15 Wend. 270, SAVAGE, Ch. J., sets forth, clearly and strongly, both the rule and the reason in this respect, and at the same time answers the point made upon the fact that the alleged bad conduct of the plaintiff was after the alleged adultery of the wife with the defendant. In that case a new trial was granted on the sole ground of newly-discovered evidence that the plaintiff, at the time of the trial, and for some time previous, had been living in adultery with another woman; and this fact would be for consideration on the question of damages. The language of the very eminent chief justice is, "If the plaintiff was in the habit of improper intimacy with other women, his sense of moral propriety and regard for chastity could not be much offended by the loss of virtue in his wife. The guilt of the defend-

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ant is not therefore diminished; but the plaintiff has sustained less damage. The merits of the plaintiff, but not the demerits of the defendant, are less; both, however, are considered by the jury in forming their verdict; and all circumstances which diminish the one, or enhance the other, are proper subjects for their consideration. \* \* \* It is true that the alleged misconduct of the plaintiff took place since the elopement of the wife; but, as damages were recovered by him for his wounded feelings, and the destruction of his domestic happiness, not only up to the time of the commencement of the suit, but until the trial, it would have been proper for the defendant to have shown that at any time during the same period he had been guilty of improprieties of the same character with those committed by the defendant."

Not only these views are entertained by this court, but as to the bearing of the fact that the equally vicious and criminal conduct on the part of the plaintiff took place after the alleged misconduct of the defendant with the plaintiff's wife, it can hardly fail to be remarked, that such conduct by the plaintiff is not sufficiently accounted for by the suggestion in the brief of his learned counsel that "it is among the natural and worst results of the defendant's offense, that men of previous good conduct are thus driven into bad courses."

Ordinarily, a man of the age of the plaintiff, and after twelve years of married life, is not driven all of a sudden from the purity of conjugal fidelity into the filthiness and criminality of adultery with a strumpet, within two months after he has brought his suit to repair the damage to his marital bed and his conjugal affections, solely by the fact that the defendant had debauched his wife, who was still living in his own house, and, for aught that appears, in the ordinary relations and manner of wife with husband, at the time of his alleged misconduct.

As the world goes, it would be a fair matter of question and consideration whether such conduct on his part, in such a conjuncture in his domestic history, would not evince a condition of mind and character of sentiment, resulting from a progressive growth, such as to render him progressively less susceptible to the kind of injury which the law in such case regards as the basis and subject for compensation.

It is a mistake to suppose that the municipal law, or the moral or divine law, discriminates between the crime or the beastliness

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of adultery, as committed by the husband or the wife, or by another party, or either of them. And though it is true that, by the *code social*, the male adulterer and debauchee has often an unquestioned currency and countenance in society, while the less offending, or only suspected, female is exorcised as a polluted and polluting thing, and is doomed to irretrievable social perdition, yet, in the eye and hands of the law, the male has no precedence of immunity or impunity. We think then there is no ground or reason for limiting the showing of misconduct on the part of the plaintiff to any particular time before the trial, or with reference to the time of the act of the defendant for which the suit was brought, provided such misconduct of the plaintiff was after marriage to his faulty wife. Such misconduct, so far as it bears on the plaintiff's susceptibilities to the kind of injury which the jury may consider in according damages, is proper to be shown on the trial.

*Judgment reversed, and cause remanded.*

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MOCHLER V. TOWN OF SHAFTSBURY.

(48 Vt. 559.)

*Highway—defect in—injury to traveler while attempting to pass another traveler.*

Plaintiff was injured while attempting to pass a team going in the same direction upon a highway which the defendant was required by statute to keep in repair. On the trial the court charged that it was the duty of the town to keep the highway in good and sufficient repair for the meeting and passing of teams, such as it might reasonably be expected the highway would be used for, and to keep such places as would naturally invite travelers to pass over them, for the purpose of passing other travelers, reasonably safe for that purpose; that if the highway at the place of the accident was insufficient in respect to the width of the traveled track, and the situation of the road was such as to lead the plaintiff to think that it was a safe place to pass, and if he used common care and prudence in undertaking to pass, and was injured by means of the insufficiency of the highway, he was entitled to recover. *Held*, correct.

CASE for injury on a highway. Plea, the general issue. The plaintiff introduced evidence tending to show that the highway at

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the place of accident, near the house of one Percy, was only about eight feet wide in the traveled track; that upon the north side of the traveled track, and adjoining it, there was a bank which sloped to the south, down to the track of the road, and that the ground at this place descended to the south, and the road a side-hill road, with no ditch upon the upper side; that said bank extended a few rods, and gradually diminished in height from the center both ways, until it came nearly to a level with the traveled track, and at its highest point was between two and three feet above the traveled track; that north of said bank, and adjoining the same, there was an open space in front of said Percy's house, where three roads met, which was some four or five rods wide, smooth on the surface, but descended gradually to the south and east to the bank; and that, at the time of the accident, there was a two-horse lumber wagon standing upon about the middle of this open space, left there by the said Percy.

The plaintiff's testimony further tended to show that on the 7th of November, 1871, the plaintiff, in company with others, had attended a wedding party in Hoosick, N. Y.; that whisky was served at the party, and that the plaintiff drank a part of one glass of sling made of the same; that the plaintiff then resided at North Bennington, and was in the employ of Thatcher & Welling, and was accompanied by a young lady, now his wife; that they left the party to return home about sunset, and arrived at the place of the accident about dark; that they left the party in company with another gentleman and lady, who, with a single team, drove in advance of them; that the plaintiff was driving a single team, and when the gentleman and lady in advance of them, and going eastwardly, had arrived at a point in said highway a short distance west of said Percy's house, they came up to a two-horse team and lumber wagon with three persons in it, which was going in the same direction on said highway, at a walk, and turned out of the traveled track, to the left, and drove past said team; that the plaintiff, for the purpose of going faster and keeping company with them, also turned to the left, out of the traveled track, to drive past said two-horse team, and drove upon said open space; that said two-horse team increased its speed, and in order to pass it, the plaintiff drove more rapidly forward until he came near the wagon standing on said open space, when, fearing a collision with the same, not knowing that there was any bank there, he turned to the right and

went down the bank in front of the two-horse team, and was overturned, and thereby sustained damage.

The defendant gave evidence tending to show that the plaintiff was driving in a fast and reckless manner; that the two-horse team was not loaded to an amount to impede its speed; that the horses were good roadsters, and that they were going, at the time the plaintiff turned out to go past them, on a good round trot; that there was no necessity for the plaintiff to turn out to go by; that the traveled track was in good condition, and that the plaintiff could have passed in perfect safety in the road, had he not voluntarily turned out of the traveled track; that there was a large open space there, sufficient for the plaintiff to have driven by without running against the wagon standing there, and that he could have passed right along and come into the traveled track further east, in safety; that the plaintiff was acquainted with said road and bank at that place, and had passed there three times before that day. It was not claimed by the plaintiff but that the traveled track was in good repair, otherwise than on account of being narrow, and of said bank; nor but that he could have passed over the same in safety, had he not turned out to go past said two-horse team. The defendant conceded that the highway at the place of the injury was one that it was bound by law to keep in repair.

The defendant requested the court to charge the jury that if, from the evidence, they should find that the plaintiff, without any necessity therefor, but for the purpose of keeping company with the horse and carriage that was ahead, voluntarily turned out from the traveled track and drove upon said open ground to pass said two-horse team, and in so doing thereby sustained the injuries complained of, by running off said bank, and that he would not have sustained any injury, had he followed the traveled track, the defendant would not, in law, be held responsible for the injuries complained of, and that the plaintiff could not recover for the same of the defendant.

The court declined to charge as requested; but charged as to that part of the case that, this being a highway that the defendant was bound to keep in repair, it was the duty of the town to keep it in good and sufficient repair for all travel, in the night-time as well as in the day-time, and for the meeting and passing of teams, such as it might reasonably be expected the highway would be used for, and to keep such places as would naturally invite travelers to pass

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over them, for the purpose of passing other travelers, reasonably safe for that purpose; that if this highway at this place was insufficient in respect to the width of the traveled track, and the bank between the traveled track and the smooth place above the bank, and the situation of the road there was such as to lead the plaintiff to think that it was a safe place to pass, and he exercised common care and prudence in undertaking to pass the two-horse team there, and in driving past it, and in turning to avoid the wagon that was standing in the open space, and in turning into the road as he did, and was overturned and injured by means of the insufficiency of the highway, without any want of ordinary care on his part, he was entitled to recover. To the refusal of the court to charge as requested, and to the charge on that subject as stated, the defendant excepted.

*T. Sibley and C. N. Davenport*, for defendant. The evidence in the case tended to show that the traveled track of the highway at the place of the accident "was in good condition, and that the plaintiff could have passed with perfect safety in the road, had he not voluntarily turned out of the traveled track." There was no evidence in the case tending to show that his deviation from the traveled track was necessary, or the result of any accident within the track. On the contrary, the plaintiff's own evidence shows that he voluntarily and designedly turned out upon the open space in front of Percy's house, for the purpose of running by a two-horse team going in the same direction; that the race was terminated by the plaintiff's turning from this open space into the traveled part of the highway, in order to escape colliding with a wagon standing in the open space; that, while so turning into the road, he passed down a bank from two to three feet in height, and, in thus passing, his carriage was overturned into the road, resulting in the damage complained of. Upon this state of facts the defendant was entitled to a charge substantially in the language of the request. *Rice v. Montpelier*, 19 Vt. 470; *Cassedy v. Stockbridge*, 21 id. 391; *Whitney v. Essex*, 38 id. 270; *Morse v. Richmond*, 41 id. 435; *Onier v. Hinesburgh*, 44 id. 220; *Shepardson v. Colerain*, 13 Metc. 55; *Raymond v. Lowell*, 6 Cush. 524; *Smith v. Wendell*, 7 id. 498; *Kellogg v. Northampton*, 4 Gray, 65.

There is a class of cases in this State where towns have been held

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liable for injuries happening upon the margins, outside the traveled track. These are cases of involuntary or accidental divergence from the traveled track, or, as it is sometimes termed, necessary divergence; to this class belong *Cassedy v. Stockbridge*, *supra*; *Glidden v. Reading*, 38 Vt. 52. Towns are under no obligation to keep the margin of their highways in safe condition to be traveled upon. The extent of their duty in this respect is to keep them in a reasonably safe condition to guard the traveler against the consequences of such accidents as may reasonably be expected to occur in the traveled part of the highway, or when, in the exercise of ordinary care, the traveler, without fault, is involuntarily or necessarily thrown or driven from the traveled track upon the margin. No case can be found in this or any other State where a town has been made liable, if the traveler voluntarily, to subserve his own convenience, left the track for the margin, and, while thus upon the margin, suffered damage.

Although it is true that, as to injuries and accidents happening within the traveled part of the highway, the liability of the town is mainly matter of fact for the jury, yet, as to liability for defects and obstructions exterior to the wrought or traveled way, it is mainly a question of law, calling for special instructions from the court. Angell on Highways, § 260; *Rice v. Montpelier*, *supra*; *Ozier v. Hinsburgh*, *supra*. And when such special instructions are asked for, in a case proper for that purpose, the omission to give them and the casting of the burden upon the jury, as in the case at bar, is error.

*Henry A. Harmon*, for plaintiff.

ROYCE, J. Cases have frequently arisen involving the question of the liability of towns for injuries resulting to parties in passing teams traveling in an opposite direction, but this is the first case that has come to our knowledge where the question has been made as to their liability for an injury happening to a party in consequence of his passing a team going in the same direction. It has not been claimed but that the rule laid down by the court, that it was the duty of the town to keep this highway in good and sufficient repair for all travel in the night-time as well as in the day-time, was the correct rule. Neither has it been claimed that, if the injury had been occasioned by the attempt of the plaintiff to pass



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a team coming in an opposite direction, but that the charge of the court would have been properly applicable and unexceptionable. But the defendant claims that, inasmuch as the team which the plaintiff attempted to pass was going in the same direction, if he voluntarily turned out of the traveled track without any necessity therefor, but for the purpose of keeping company with the horse and carriage ahead, and thereby sustained the injuries complained of, and would not have sustained any injury had he followed the traveled track, he could not recover. The court charged that it was the duty of the town to keep the highway in good and sufficient repair for the meeting and *passing* of teams, such as it might reasonably be expected the highway would be used for, and to keep such places as would naturally invite travelers to pass over them, for the purpose of passing other travelers, reasonably safe for that purpose. That if the highway at this place was insufficient in respect to the width of the traveled track and the smooth place above the bank, and the situation of the road there was such as to lead the plaintiff to think that it was a safe place to pass, and if he used common care and prudence in undertaking to pass the team, and was injured by means of the insufficiency of the highway, without the want of ordinary care on his part, he was entitled to recover. If towns are under any statutory duty to provide for the safety of travelers in passing teams going in the same direction, by keeping places which naturally invite the attempt in good and sufficient repair, there was no error in the charge. But if towns owe no such duty, there was error, and the request of the defendant should have been complied with. An attempt has been made to bring this case within the rule laid down in *Rice v. Montpelier*, 19 Vt. 470. In that case, the road against the place of the injury was smooth and well made, and from twenty to thirty feet wide, and the injury did not occur from any defect in the traveled part of the road, but from a hole dug by an individual in the ditch, three feet from the outer edge of the traveled track. The plaintiff, for no apparent reason, except to get on to the snow, passed along in the ditch, and his horse ran into the hole, and the question was, whether the town, under such a state of facts, was liable, and the court held it was not. If the same facts had appeared in this case as to the width of the traveled track, the plaintiff, under the charge of the court, could not have recovered. For the charge predicates the right of recovery upon the insufficiency

of the highway in respect to the width of the traveled track, and the jury must have found this fact in favor of the plaintiff. There are cases where it is absolutely necessary for the traveler to pass teams going in the same direction. The whole object and purpose of his journey may be frustrated unless he is enabled to do so; and the statutory duty of the town requires that its highways should be so constructed and kept as to enable him, with the exercise of ordinary care, to do so. This is one of the kinds of travel which the town might reasonably expect the highway would be used for. In this case there was no absolute necessity shown for the plaintiff to pass the team. He was influenced by the desire to keep in the company of the party with whom he had been traveling, and to make more rapid progress. But we do not think the obligation of towns is limited to cases of absolute necessity, and that the charge of the court furnishes the just criterion of liability. It imposes no new or onerous duty upon towns; for they can always protect themselves from liability, by constructing their highways of such width as to permit the passing of teams without deviating from the traveled track; and if the traveler is wanting in common care and prudence, either as to the time, place, or manner of passing, the town is not liable.

*Judgment affirmed.*

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MORGAN V. CREE.

(48 Vt. 772.)

*Taxation — construction of term "public taxes."*

A township was granted to a college by a charter providing that the land in the township should be exempt from "public taxes." *Held*, that it was not exempt from taxation for municipal purposes.

CASE against Cree and others, as listers of the town of Wheelock, for listing plaintiff's land whereby a tax was assessed upon it and plaintiff's property distrained and sold therefor. The case was tried upon the following agreed statement of facts:

On the 14th day of June, 1785, the governor, council, and general assembly of this State, by charter of that date—reciting that

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Dartmouth College and Moor's Charity School, situated on the east bank of Connecticut river, had been and were of important service in diffusing useful literature among mankind, and throughout this State in particular, and that the Hon. John Wheelock, for and in behalf of the trustees of said college, and in behalf of said school, had applied by petition for a grant of a tract of unappropriated lands within this State, for himself as president of said college and school, and his successors in office, and for the trustees of said college and their successors—gave and granted unto the said Wheelock as president of said school, and to the trustees of said college, a certain tract of land therein described, containing about six miles square, and thereby incorporated the same into a township by the name of *Wheelock*, and declared that "the inhabitants that do or shall hereafter inhabit said town, or precinct, are hereby declared to be enfranchised and entitled to all privileges and immunities that the inhabitants of other settled towns within this State do, by law and the constitution thereof, exercise and enjoy." *Habendum*: "The said Wheelock as president, and for his successors in office, to have and to hold the one moiety of said premises as above described, solely and exclusively for the use and benefit of said school forever; and the said trustees and their successors in office, to have and to hold the other moiety solely and exclusively for the use and benefit of said Dartmouth College forever. All the privileges and appurtenances thereunto belonging and appertaining are hereby also granted to the said president and trustees for the purposes aforesaid on the following conditions and reservations, viz.: That one hundred and fifty acres of land be reserved for the use, benefit and support of the ministry of the gospel in said township or precinct, forever; one hundred and fifty acres of land for the use and support of an English school or schools in said township or precinct, forever; to be located as near the center of said township or precinct (on good tenantable land) as the situation thereof will admit; and whereas the said grant of land is for a public and important use, it is hereby declared that the land and tenements in every part of said township or precinct shall forever be free and exempt from public taxes, that is to say, so long and while the incomes and profits shall be actually applied by said president and trustees, and their successors, to the purposes of said college and school as above expressed."

Said college and school have long been and now are incorporated by law, and located at Hanover, N. H., and they commenced leasing said lands in 1794, for the term of 998 years, and have continued to lease the same, down to within a few years, for about the same term of time—at first requiring the lessees to pay \$6 annually per 100 acres, and lately, to pay \$6.67 per 100 acres; this last sum being the legal interest of one hundred crowns, they valuing the land at one crown, or \$1.11 per acre. They made a provision in their leases from 1794 to 1830, giving the lessees the privilege of paying a sum of money that would be equal to one crown per acre, and, if the lessees so paid, the college and school would relinquish and quit-claim the rent reserved for the remainder of the term; and also provided in all the leases, except one, that in case of the payment of the capital, or any part thereof, the said college and school thereafter should not be liable for the payment of any tax or taxes which might be assessed or levied on the land, and, in some of their discharges, they made the same provision against the payment of taxes.

Since 1830, said college and school have left out the provision relating to the paying up of the capital, and the provision relating to the payment of taxes; but have continued to take the capital of the lessees, when offered, and to discharge future rents. In 1851, the college and school made application to the legislature of this State, and procured the passage of an act enabling them to convey to the lessees, in fee-simple, their lands, and also to convey in the same manner to any person the lands unsold; since which, they have conveyed in this manner by warranty deed when desired so to do.

There are about 24,000 acres of land in the township; on sixteen twenty-fourths of which the capital has been paid or otherwise discharged; six twenty-fourths of which are now paying rent to the college and school, and two twenty-fourths are now unsold, and is the property of said college and school, and is unimproved.

The town was organized March 29, 1792, and has ever since kept up and maintained its organization as a town. From 1792 to 1819, inclusive, the improved land and the buildings in said town were set in the grand list thereof, for town, school, and highway taxes; but in the grand list returned to the legislature for State taxes, the land and buildings were left out. Since and

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between 1820 and 1858, the land and buildings have been left out of the list for all purposes of taxation.

In 1857, the legislature of the State passed an act, approved November 10, 1857, for the relief of the town of Wheelock, authorizing the town, under certain regulations, to appraise and set in the list the lands held under lease or leases from Dartmouth College and Moor's Charity School—said list, with the land included, to be used to raise money to pay town expenses, school district taxes and highway taxes; under which the town has since appraised and set the land in the list, following in all things the requirements of said act. The listers deducted from the appraisal of the lands paying rent, the capital of one crown per acre, and set the balance of the value in the list to the owner thereof; those lands with the capital paid up were set in the list at their fair cash value; the 2,000 acres owned by the college and school, and unleased and unsold not being appraised or set in the list. Said college and school have expended and appropriated the funds received of the lessees for capital, to their common purposes and expenses, that is, in payment of the salaries of the professors and other necessary expenses, though a separate account has been kept with the Wheelock lessees, so that payments of rent and capital may be distinguished and separated at any time. It is conceded by the defendants that the plaintiff was the owner of 100 acres of land in Wheelock, which he and his grantors held under title by lease for 998 years, originally to Daniel Cross from Dartmouth College; that the defendants, as listers as aforesaid, appraised the same at \$800, the said land being crown free and paying no rent; that the defendants as listers as aforesaid, in 1858, set the same in the grand list of that year at \$8, being one per cent of the appraised value; that the selectmen of said town, in order to raise a sum of money voted by said town to pay town expenses, assessed a tax of forty-one cents on the dollar of said list, making a tax of \$3.28 against the plaintiff, which sum, with others, the selectmen placed in a tax-bill, with a warrant for collection, directed to Rufus M. Hubbard, collector of said town, who, on the plaintiff's refusal to pay said tax, distrained two buffalo robes and one saddle, the property of the plaintiff, and sold the same to satisfy said tax and costs. The court rendered judgment, *pro forma*, for the defendants; to which the plaintiff excepted

*E. A. Cahoon and T. P. Redfield*, for plaintiff. It has been uniformly held that a grant of land by a sovereign State, providing and enacting in the grant that the land which is the subject of the grant shall be forever exempt from taxation, is a *contract* within the meaning of the constitution of the United States. *Fletcher v. Peck*, 6 Cranch, 87; *State of New Jersey v. Wilson*, 7 id. 164; *Territt et al. v. Taylor et al.*, 9 id. 43; *Dartmouth College v. Woodward*, 4 Wheat. 578; *Wales v. Stetson*, 2 Mass. 143; *Green v. Biddle*, 8 Wheat. 1; *Gordon v. Appeal Tax Court*, 3 How. 133; *State Bank v. Knap*, 16 id. 386; *Herrick v. Randolph*, 13 Vt. 529; *Atwater v. Woodbridge*, 6 Conn. 223; *Smith's Com.* 404; *Osburn v. Humphrey*, 7 Conn. 335. But it is claimed that taxes assessed to defray town expenses are not "public taxes." The tax is imposed by the authority of a public statute enacted by the same sovereign power which made the grant; the same authority that imposes a tax for the support of schools; and the only difference is, that the one delegates to the town to assess the amount, the other is fixed in the law itself. A tax assessed and enforced under the authority of the law of the State is a "*public tax*." It is used, probably, in contradistinction from proprietary and conventional taxes.

The plaintiff's title to the land assessed was derived from the college by a lease for the term of 998 years, reserving annual rent to the college. Thus far the "income and profits are actually applied to the purposes and for the use and benefit of said college." But subsequently the plaintiff paid the college a sum of money, the interest of which was the amount of rent reserved, and, in consideration thereof the college *discharged future rents*. The relation of the parties is the same as before—the rent for the whole term has been paid in advance, and that sum "applied to the purposes and for the use and benefit of the college."

The listers of Wheelock, under the act of 1857, have appraised all the lands leased by the college and school, and set them in the list; the plaintiff's land at full value; and where the rents have not been paid for the term, they have deducted from the appraisal a sum, the interest of which would be the rent reserved. The State makes no distinction, and we think no legal distinction exists. If the State can impose taxes upon the one, it can upon the other. The cases of *Dartmouth College v. Woodward* and *State of New Jersey v. Wilson* are sufficient authority that the exemption in the grant is a *contract*, and upon *sufficient consideration*.

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The lease was executed upon the faith of the State, that the lands were exempt from "public taxes." The plaintiff's title, rights and interest exist solely under and by virtue of the lease. The fact that a party paid two years' or ten years' rent at one time or in advance could have no effect upon the title. Nor could the fact that such *accumulated rents* were applied with other funds to pay for a *college building*, or to cancel a debt that had accrued, or for a new *professorship*; in each case "the *income* and *profits*" have been "applied for the *use* and benefit of said college." And the court will *presume* that the income and benefits *paid* to the college have been "*applied to the use and benefit* of the college" — having been paid to the officers of the college, and paid to meet its current expenditures.

If it be said that a lease for a long term, and the rents *afterward* discharged, is tantamount to a *conveyance in fee*, it is an obvious reply that the provision in the charter, that the land should be *exempt from taxes*, was, and will be *presumed* to be, an important element in the *contract*, and did much enhance the *value* of the land, and thereby enable the college to obtain *higher rent*.

If it be conceded that the contract, as evidenced by the lease, is protected from "unfriendly legislation," it would seem a legal sequence that a subsequent payment of the whole rent in gross does not change the nature of the *contract*. Nor are such rents used in gross by the college, less "applied for the *use* and *benefit*" of the college.

The charter declares the grant to be for a public and important "*use*;" "to hold solely and exclusively to the *use* of said school and college." This created a trust; and the trustees could, neither with nor without the consent of the legislature, pervert or impair the trust; they could not alienate the title. *Montpelier et al. v. East Montpelier et al.*, 27 Vt. 704.

The charter, to render the *use* more beneficial, declares the land forever free and exempt from "*public taxes*," and adds, — "that is, so long and while the income and profits shall be actually applied," etc. But this neither enlarged nor restricted the *duty* of the trustees. They were *bound*, it was a *trust-duty*, so to apply *the fund*; and an attempt to pervert it would be utterly void.

T. J. Cree, Peck & Colby, for defendants.

PECK, J. The grievance complained of is, that the defendants, as listers of the town of Wheelock, set the plaintiff's land, situate in Wheelock, in the list of that town for the assessment of town taxes; and that, in consequence thereof, town taxes were assessed upon it against the plaintiff, and collected by the sale of the plaintiff's property. The ground upon which the plaintiff claims to recover is, that the land, by the original charter of the town, is exempt from such taxation, and that therefore it was wrongfully set in the list. It appears by the charter of the town, dated June 14, 1785, that the State of Vermont granted the town of Wheelock to Dartmouth College and Moor's Charity School, reserving 150 acres for the use, benefit and support of the ministry of the gospel in said town, and 150 acres for the use and support of an English school or schools in said town. The charter also incorporates the territory granted, into a town, by providing that "the inhabitants that do or shall hereafter inhabit said town, or precinct, are hereby enfranchised and entitled to all privileges and immunities that the inhabitants of other settled towns within this State do by law and the constitution thereof exercise and enjoy." The charter provides that, "whereas the said grant of land is for a public and important use, it is hereby declared that the land and tenements in every part of said township, or precinct, shall forever be free and exempt from public taxes, that is to say, so long and while the incomes and profits shall be actually applied by said president and trustees, and their successors, to the purposes of said college and school as above expressed." The plaintiff derived his title from the original grantees under the charter, and claims it is exempt from the tax in question under the foregoing provision. The town having been organized in 1792, from that time down to 1820, set the lands in the list, and assessed town taxes thereon, leaving the lands out of the list returned to the legislature for State taxes; and from 1820, omitted to tax the lands till the legislature passed the act of 1857, providing for assessing taxes on such lands for local purposes of the town. After this act was passed, the defendants set the plaintiff's land in the list as already stated, which is the grievance complained of. The charter was issued by virtue of an act of the legislature, passed at the June session thereof, 1785, granting the land and requesting the governor and council "to issue a charter of incorporation for the same," the act saying nothing as to exempting the land from taxation. Vermont State



Papers, 497. One of the main questions presented by the case and in the argument is, whether a town tax is a public tax within the meaning of the charter, exempting such land from "*public taxes*." It is claimed on the part of the plaintiff that the word *tax*, *ex vi termini*, imports a public tax. It is true, a *tax*, in its ordinary acceptation, is a sum imposed or levied by government or other authority. It is a general term applied to whatever is required by the government or local authority thereof to be paid by the people. It presupposes that the burden is imposed by some authority other than that of the individual taxed, else it would not be a tax, but a voluntary contribution. So too its object, or the purpose to which it is applied, is to some extent public; that is, its use is not confined exclusively to the benefit of the particular individual tax payer, but extends to some common object in which more or less individuals have an interest. Yet, it is obvious that a tax may be so levied, and so limited in its character and object, as not to be a public tax; and this idea must have been in the mind of the parties to this grant; otherwise, the word *public*, in the clause of exemption, is without meaning. Indeed, this is virtually conceded in the argument for the plaintiff; for it is contended that the phrase "*public taxes*" is used in the charter in contradistinction to proprietary taxes imposed about that period by the proprietors of towns, on their common lands, for their common benefit. It is also claimed that town taxes are public taxes, because, although voted by the inhabitants of the town, or assessed by its officers, the authority to do so is derived from a public source, the legislature. But it is evident that this is not decisive; for all power of taxation emanates from the sovereign power, either State or national. The land proprietors under town grants, along about the period of the date of this charter, were in the habit of voting taxes upon the common property, to defray the expenses of surveys, for laying out roads, and other purposes for the benefit of their common property, and to facilitate the sale and settlement of their lands; but the power was given by statute. It is conceded that such taxes were not of such a character as to come within the exemption in the charter. The word *public* is used in a more restricted or comprehensive sense, according to the subject to which it is applied. A private corporation sometimes possesses a limited power to tax its members, derived from the State which grants the charter; yet a tax

imposed by such corporation, by virtue of such delegated power, would not be a public tax.

It is claimed by defendants' counsel, that as the charter contains a grant of corporate powers as a town to the inhabitants of the territory granted, with all the rights and privileges of other towns, the exemption of all the lands and tenements in the town from town taxes would be void, as being repugnant to the charter, so essential is the power of taxation of such property to the existence of the corporation, and the discharge of its municipal obligations; and if not so, still, that the court ought to put such a construction upon the charter as to avoid such consequences as would follow from the plaintiff's construction. We cannot say that such exemption of the real estate would so far deprive the town of the means of performing the duties and obligations incident to the existence of the town as a corporation, as to render such provision in the charter void merely for repugnancy. The town would still have the same power of taxing the persons and personal property of the inhabitants of the town as is possessed by other towns. But if the language exempting all the lands and tenements from public taxes is susceptible of two interpretations, the defendants have a right to insist on that construction which would give that effect to all the provisions of the charter most consistent with its intent. It is true that, if we hold that the lands and tenements are exempt from town taxes, the grant of all the rights and privileges possessed by other towns cannot have full and complete effect, but would be restricted to an extent embarrassing to the town; but if we hold that town taxes are not included in the exemption clause, the town is invested with all the rights and privileges of other towns; and this consideration favors the construction claimed by defendants, and is a strong argument in its favor. But, if the words "public taxes" are susceptible of but one interpretation, and necessarily include town taxes, then, although they are to some extent repugnant to the general grant of corporate powers, they must have the effect to limit this general grant of corporate rights and privileges, as the special provisions must be construed as qualifying the more general words of the grant. But the word *public*, as applied to taxes, has no such fixed and settled meaning as necessarily to include town taxes within the words "public taxes" used in the charter. The word *public* is used variously, depending for its meaning on the subjects

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to which it is applied. Public law in one sense is a designation given to international law, as distinguished from the laws of a particular nation or State. In another sense, a law or statute that applies to the people generally of the nation or State adopting or enacting it is denominated a public law, as contradistinguished from a private law affecting only an individual or a small number of persons. There is a material distinction between public and private statutes; and the books contain definitions of each, and abound with cases explaining the distinction. It is easy to illustrate this distinction by stating plain or extreme cases; yet cases often arise under statutes partaking so much of the character of each as to render it difficult to decide to which class the particular statute belongs. The terms *public debt* and *public securities*, used in legislation, are terms generally applied to national or State obligations and dues, and would rarely if ever be construed to include town debts or obligations, nor would the term *public revenue* ordinarily be applied to funds arising from town taxes. The question is not entirely free of doubt, what is or is not included in the term *public taxes*, where used in public grants or legislative proceedings. A State tax would clearly be of that character, levied by the legislature of the State for the general purposes of the State, embracing the people of the State at large. A town tax, in one view, seems to partake somewhat of the same character, its purpose being to defray the expense of the town organization, and to enable it to perform its duties and discharge its obligations imposed upon it as a municipality constituting a part of the polity of the State. On the other hand, it differs materially from a State tax; it is levied by the town or assessed by its officers; its purpose is not the direct benefit of the people of the State generally, but local in its use and purpose, affecting directly the property and people of a small municipality. We think the words "*public taxes*," in the charter, are open to construction as to whether they were used in the sense of including, or in the sense of excluding, town taxes. Many considerations are urged on both sides as bearing on the question. The user under the charter is relied on by both sides. The defendants rely on the user from the organization of the town in 1792 to 1820, setting the lands in the town grand list and assessing town taxes thereon, leaving out such lands in the list for State taxes. When the sense in which a word or words are used in a public charter or grant is open to con-

struction, the contemporaneous construction for a long period of time, by the user of the parties under it, is entitled to great weight in the interpretation of it, especially if it is of ancient date. In this case the omission to thus tax the lands from 1820 to 1857 lessens the weight of the evidence derived from the earlier user, but does not destroy its force. The practical construction of the charter by the parties in interest, in effect treating town taxes as not included in the exemption for more than a quarter of a century immediately succeeding the organization of the town, commencing so soon after the date of the charter, is entitled to weight in favor of this construction, notwithstanding the later usage. In construing public charters at a time long after their date, reference should be had to the condition of things, and the circumstances existing, at and about the time of their date. In determining whether a town tax is a public tax within the meaning of the charter, it is proper to consider how it was regarded in that respect at the period of time about the date of the charter, and whether it was then included in what was generally denominated public taxes. At that time the general rights and powers of towns, as to the purposes for which they might levy taxes, were not as clearly settled and defined as at the present time. Hence we find frequent statutes about that period, authorizing towns and other communities to levy and collect taxes for particular purposes. In relation to many subjects, the right to raise taxes was given to towns, and also to other communities or *quasi* corporations for the same object. The country was new, and much of the land that had been granted was wild and unsettled, and the title to which was held by the original proprietors under their charters, in common and undivided. These proprietors were often invested with power to levy taxes on these lands held in common, to lay roads, and for other purposes, to promote the sale and settlement of their lands. Towns at the same time had power to raise taxes for many of the same purposes. Towns and parishes were by statute given power to raise taxes to build meeting houses, and for the support of a minister of the gospel, on the polls and ratable estate of the inhabitants; towns in some instances being divided into parishes for that purpose, and the power was extended to communities in places not in any organized towns, to raise money on the polls and ratable estate of the persons associating. The acts of the legislature about the time of the date of this charter, and so near the time of its date as to have some

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bearing on this question of construction, have been examined to some extent, some of which have been referred to in argument, to see in what sense the words *public tax* were used at that period. Nothing is found in this legislation specifically defining what tax shall be deemed a public tax; but the manner in which State taxes and town taxes are spoken of furnishes reason to infer that the term *public tax*, when used at that period, had reference to State tax, and not understood as including town tax. Some of these statutes relating to levying and collecting taxes, expressly denominated State taxes, *public taxes*, that is, use these terms apparently as synonymous; while town taxes, when spoken of in the same or in other acts, are not so designated, but are classed with parish, district, society, and other local taxes. From this it is not unreasonable to conclude that the term "public taxes" was used at that period as applicable to State taxes pertaining to the public revenue, and not as including town and other municipal taxes. *Shoakwater v. Armstrong*, 9 Humph. 217, is an instance of the interpretation of the term *public taxes* in this restricted sense. It was decided in that case that the statute passed in 1844, providing "that in all cases of sales of land hereafter made for public taxes under the provisions of the laws now in force," the sheriff's or collector's deed reciting the facts necessary to make a valid sale and convey a good title should be *prima facie* evidence of such facts, did not apply to a sale for a *town tax*, for the reason that a town tax was not a *public tax*. This case may not be decisive of the sense in which the words in question in this charter should be construed, but it bears strongly in favor of the defendants' construction. To determine this question of construction, it is proper to look at the object and purpose of the exemption, and see what interpretation of the words in question will secure to the grantees the immunity intended, and at the same time not to transcend it. The object was to make the grant more available to the grantees, by relieving the property from some burden for the support of government, to which other property of the kind was subject. The land was then mostly wild and uncultivated. It is manifest that relieving the land from State taxes would operate beneficially to the proprietors, by affording an inducement to persons to take leases on terms more favorable to the proprietors, and become settlers in the town. It must have been desired and expected by the grantees in the charter that lessees under them would become

settlers upon the land and inhabitants of the town, and thereby facilitate the settlement of the town and make the grant more available. This exemption from State taxes is valuable to the grantees in the charter, because it is valuable to the inhabitants of the town who may hold under them. The exemption of the lands from State taxes would tend to induce people to take leases under the grantees in the charter, and to become inhabitants of the town; the two things which the grantees in the charter would desire. But no such benefit would arise or have been expected from an exemption of the land from town taxes. The charter contained a provision that the territory granted "be and hereby is incorporated into a township by the name of Wheelock," and declared the inhabitants thereof entitled to all the privileges and immunities that the inhabitants of other settled towns exercise and enjoy. This necessarily imposed upon such inhabitants all the duties, obligations, and burdens which, by the constitution and laws of the State, were or should be cast upon other towns. The necessary means for discharging these duties must be raised by taxes upon the persons and taxable property of the inhabitants. The aggregate expense for this purpose to be borne by the inhabitants is not lessened by exempting the land from town taxes; it only throws the more upon the persons and personal property of the inhabitants, the great mass of whom must necessarily have been expected to be owners or holders, under leases from the grantees in the charter, of most of the lands in the town. It is difficult to see how the perpetual exemption of the land and tenements from town taxes, claimed by the plaintiff, could have been regarded as an immunity beneficial to the inhabitants of the town holding under the grantees in the charter, to any desirable extent. Such exemption from town taxes in a grant of a lot, or a small portion of the town, would be beneficial to the grantee; but it is different when the exemption applies to the lands and tenements of the entire township, thus depriving the inhabitants of the entire power of taxation of the lands as a means of discharging their municipal obligations as a town, and casting it on their persons and personal property. It is not reasonable to suppose that such an anomalous municipality was intended to be created by the charter.

In the case of *The Providence Bank v. Billings & Putnam*, 4 Pet. 514, MARSHALL, Ch. J., in reference to the relinquishment by the State of the right of taxation as to certain property, says :

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“It would seem that the relinquishment of such a power is never to be assumed. We will not say that a State may not relinquish it; that a consideration sufficiently valuable to induce a partial release of it may not exist; but, as the whole community is interested in retaining it undiminished, that community has a right to insist that its abandonment ought not to be presumed in a case in which the deliberate purpose of the State to abandon it does not appear.” It is a rule, that public grants, especially where some special privilege is granted or claimed, be construed beneficially in favor of the public, and strictly against the grantee; and where susceptible of two interpretations, one more extensive and the other more restricted, that most favorable to the public is adopted. This is the general rule both in England and in this country; although it has often been unsuccessfully claimed in argument; as in *Charles River Bridge v. Warren Bridge et al.*, 11 Pet. 420, that this rule ought not to apply in this country, because here, public grants are made by the people through their representatives.

The conclusion is, we hold that the term “public taxes” was used in the charter in reference to taxes pertaining to the public revenue, as contradistinguished from local municipal taxes, such as town, parish, district, and village taxes, assessed upon, and to be expended for the use and immediate benefit of, the particular municipality. This construction satisfies the language and accomplishes the purpose of the exemption, and is in harmony with the rule of interpretation applicable to the case. Other important questions have been discussed in the case, but, as the decision of this question in favor of the defendants is decisive of the case, there is no necessity of deciding the other questions raised.

Judgment of the county court for the defendants is affirmed.

*Judgment affirmed.*

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**RHODE ISLAND.**

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**CLARK V. PECKHAM.**

(10 R. I. 35.)

*Riparian rights—access to navigable streams.*

A riparian owner of land bounded by navigable water has a right of access to such navigable water, of which he cannot be lawfully deprived; and any one doing any thing in front of the land of such a riparian proprietor, which makes it less accessible, is liable in damages therefor.

ACTION of the case against Joseph C. Peckham, city treasurer, to recover damages of the city of Providence, for injuries caused by filling up the dock of the plaintiff. The case was first tried at the March term, 1868, of the Supreme Court for this county, and after a verdict rendered in favor of the plaintiff, a new trial was granted at the March term, 1870, of the Supreme Court for this county (see report of the case, 9 R. I. 455), and the case was again tried at the October term, 1870, of said court for this county, before Mr. Justice POTTER and a jury, when, after a verdict in favor of the plaintiff for \$9,000, the defendants moved for a new trial on the ground that the verdict was against the evidence and the weight thereof, and for alleged errors on the part of the judge presiding at the trial in his instructions to the jury, which are sufficiently stated in the opinion of the court.



## Clark v. Peckham.

*Payne & Parkhurst*, for defendant, in support of the motion, contended that the verdict was against the evidence, and also, 1. That the plaintiff had no right of action against the city for constructing and maintaining the sewer described, upon the land to which the plaintiff had no title, or for filling up a dock in which the plaintiff had no interest other than that of every one of the public. *Parton v. Holland*, 19 Johns. 92; *Radcliffe, Exr. v. Mayor of Brooklyn*, 4 N. Y. 195; *Callender v. Marsh*, 1 Pick. 418; *Mil-lard v. Cambridge*, 3 Allen, 574; *McLauchlin v. Charlotte & South Car. R. R. Co.*, 5 Rich. 583, and cases cited; *Clark v. Peckham, City Treasurer*, 9 R. I. 455; *Richardson v. Boston*, 19 How. 263; S. C., 24 id. 188; *Boston v. Lecraw*, 17 id. 426. 2. That the plaintiff could not, under his writ and declaration, recover for special damages sustained by a public nuisance.

*Eames & James Tillinghast*, for plaintiff, *contra*, contended that the verdict was not against the evidence, and also, 1. That the plaintiff could maintain this action although he showed no title to Dorrance street or Dorrance street dock. *Clark v. Peckham, City Treasurer*, 9 R. I. 455; *Richardson v. Boston*, 19 How. 263. 2. That the plaintiff could recover his special and peculiar damages, although occasioned by what was in itself also a public nuisance. Sedg. on Dam. pp. 29 and 156; *Clark v. Peckham, City Treasurer, supra*; *Paterson & Newark R. R. Co. v. Stevens*, 34 N. J. 532; S. C., 3 Am. Rep. 269; *Stetson v. Faxon*, 19 Pick. 147. 3. That the plaintiff could recover although he showed no title to the land lying at the head of the dock. At least as against everybody but the owner of the fee of the land at its head, the plaintiff had the right to have this dock kept open and unmolested for the use of his wharf. *Clark v. Peckham, City Treasurer, supra*; *Simmons v. Mumford*, 2 R. I. 172; *Marblehead v. County Commissioners*, 5 Gray, 451; *Richardson v. Boston, supra*.

POTTER, J. In this case the plaintiff was owner or occupant of two wharves, claiming title under the Dorrance Street Association, which had formerly filled in a large tract of land. There was a dock between these two wharves. The land at the head of this dock was claimed to be a part of the land filled in by the association. On the part of the city it was claimed that the piece at the head of the dock (where the sewer emptied into the river) had become a highway by the filling in or by dedication.

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If Dorrance street formerly extended to the water, then, as the proprietors filled in, the street would be continued to the new made water line. But the city asserted no claim to the fee of the land so made. Whether it is still in the Dorrance Street Association, or whether the deeds of the lots sold extended to the center of the highway, is of no consequence in the present case.

The owners of the plaintiff's wharf had, in the assertion of their admitted rights, built out to the harbor line, one effect of the act establishing a harbor line being that they might wharf out to it without being liable to indictment for a nuisance or injury to navigation. Any other effects of such an act it is not now necessary to consider.

The plaintiff claimed that the city had, by means of the Dorrance street sewer emptying in at the head of the dock, discharged a great quantity of mud, etc., into this dock, by which it was partially filled, and he was injured thereby; but no one claiming any right had ever filled any of the space between these wharves, unless this filling out now complained of was so done.

This case has been once before heard before this court upon other points, and a new trial granted.

A new trial was had, and the counsel for the city requested the court to charge that, as the owner of the bank at the head of the dock has a right to fill out, and as the plaintiff is not the owner, he cannot maintain an action whoever else may fill out, as he, the plaintiff, has no absolute right to have it kept open. If filled up at all, no one can object but the riparian owner, and no one but the riparian owner can be damaged by the filling.

But the court charged the jury, that unless the city claimed the fee of the bank at the head of the dock where the sewer emptied, or claimed under the person who held the fee, they would have no right to fill it.

And the counsel for the city further requested the court to charge, that under the plaintiff's writ and declaration he could not recover for special damages sustained by a public nuisance.

But the court charged that if the city by this sewer filled up any portion of the harbor to the injury of navigation, that was an indictable offense; but if the filling had caused any particular injury to the plaintiff, he could recover.

That, while the shore itself, and the space between high and low-water mark is public for passage, the riparian owner has a right of

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access to the great highway of nations, of which he cannot be deprived, is recognized by a great number of cases. *Clement v. Burns*, 43 N. H. 609, 617, 619; *Bowman's Devises and Burnley v. Wathen et al.*, 2 McLean, 376; *Lessee of Blanchard v. Porter Collins et al.*, 11 Ohio, 138; *Crawford v. Village of Delaware*, 7 Ohio St. 459; *Blundell v. Catterall*, 5 B. & A. 287, 294, 304, 309; *Somerset v. Fogwell*, 5 id. 883; *Martin et al. v. Waddell*, 16 Pet. 367. And this riparian right of access is valuable—is property, and can only be taken on compensation. *Yates v. Milwaukee*, 10 Wall. 497, 504.

So far as concerns the front of his land, the riparian owner has the undoubted right of access to it; and no one could do any thing in front of his land to make it less accessible, without being liable for damages. *Richardson v. Boston*, 24 How. (U. S.) 188; *Harrison v. Sterret*, 4 Har. & McH. 540. But wherever the tide-water flows, and so long as it flows, it is a portion of the great highway.

So long as the dock is not filled by the owner of the bank it is subject to the *jus publicum* of being used for passage by the whole public. Even if the riparian owner fills out his whole front, so long as the adjoining owner does not wharf out, he has a right of access to the sides of his wharf; he has indeed no exclusive right to the use of the water opposite the adjoining land; he has it in common with the world; but it is enough that he has it; to him it is of especial value as giving him additional facility of access to his wharf.

In the case of a highway on land, there may be an obstruction of the right of the public for which the remedy would be by indictment; but if that obstruction was of such a nature and so placed as to prevent the access of any proprietor to his own land, then that would be a special damage to him, for which he might sue.

So in the case of the highway on tide-water. It is admitted that the adjoining owner has the right to wharf out, but no one else has a right to prevent the plaintiff's access to the sides of his wharf; and as the city does not claim the fee of the bank at the head of the dock where the sewer empties, and does not claim to have acted under the owner of the fee, we think there is no justification for the act complained of; and that, although it might be a public nuisance to navigation, the plaintiff is entitled to claim for any special damage.

*Motion for new trial denied, and judgment on the verdict.*

**RICHMOND MANUFACTURING COMPANY V. ATLANTIC DE LAINE  
COMPANY.**

(20 R. I. 108.)

*Water-courses — pollution of.*

Every owner of land through which water flows is entitled to receive the water uncorrupted in quality from riparian proprietors above him, and a court of equity will issue an injunction to prevent such corruption, upon satisfactory proof thereof.

BILL in equity, brought by the complainants, a corporation situated upon a running stream, the Woonasquatucket river, engaged in the business of dyeing, bleaching, and printing cotton cloth, and the general business known as calico printing, against the respondents, a corporation situated higher upon the same stream, engaged in the business of manufacturing, dyeing, coloring, and producing goods made partly of wool, known as worsted goods.

The bill alleged that the respondents emptied and discharged their refuse dye stuffs into the stream, and by so doing injured its water and rendered it unfit for use by the complainants for dyeing, bleaching, and calico printing at the place where it was taken from the river for use by them, and prayed for perpetual injunction enjoining the respondents from so emptying and discharging their refuse dye stuffs.

The answer admitted that the respondents emptied their refuse dye stuffs into the river when necessary, and as required in the prosecution of their business, but denied that by so doing they perceptibly or appreciably injured its water, or rendered it unfit for the purposes for which it was used by the complainants, and also claimed that as riparian proprietors they had a lawful right so to do.

It appeared in evidence that the complainants took their water from the river through a conduit, the entrance to which was situated 2,875 feet below the drain of the respondents' works, and that the distance between the entrance to said conduit and the works of the complainants' was 2,070 feet, making the distance between the place on the Woonasquatucket river, where the respondents empty

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their refuse drugs and dyes, and the place where the water of said river is taken into the complainants' works for use, 4,945 feet, or nearly one mile.

Much evidence was taken by both parties, which is stated as fully as is necessary to an understanding of the points of law decided, in the opinion of the court.

*Caleb Cushing, Hart & Parsons*, for complainants, contended, I. That under the rules which govern courts of equity in the exercise of their general jurisdiction in cases of like character with this, the complainants, if the allegations of their bill were sustained by their proofs, were entitled to the relief prayed for, namely, an absolute and perpetual injunction against the respondents, citing 2 Story's Eq. Juris., §§ 925-927, notes (8th ed.), and cases cited; *Sutcliffe v. Isaacs*, 1 Pars. Sel. Eq. Cas. 496 *et seq.*; *Wood v. Sutcliffe*, 8 Eng. L. & E. 217 *et seq.*; *Crossley v. Lightowler*, Law Rep., 3 Eq. 291; S. C., Law Rep., 2 Ch. 478; Angell on Water-courses (6th ed.), 228 *et seq.*, notes, and cases cited; *Goldsmid v. The Tunbridge Wells Improvement Commissioners*, Law Rep., 1 Ch. 354; *Holsman v. Boiling Spring Bleaching Co.*, 14 N. J. Eq. 338 *et seq.*, and cases cited.

II. That the evidence introduced by the respondents to show that there were other manufacturing establishments on the Woonasquatucket river, the refuse matter from which was poured into it, thereby aiding in the pollution of the stream, could not avail the respondents, because a wrong-doer cannot defend his own share in a wrong by showing that another is equally guilty with him, citing *Wood v. Sutcliffe*, *Crossley v. Lightowler*, and Angell on Water-courses, 240, *supra*; also *St. Helen's Smelting Co. v. Tipping*, 11 H. L. Cas. 642.

III. That the averment in the answer that the respondents were riparian proprietors was no defense to the allegations of the bill, and could not avail the respondents as a justification of their pollution of the river, or as the basis of any right to do the acts admittedly done by them and complained of in the bill, citing *Bordwell v. Ames*, 23 Pick. 333; *Snow v. Parsons*, 28 Vt. 459, and Angell on Water-courses (6th ed.), 233, 234, and cases cited.

*R. W. Greene, Payne & Tobey*, for respondents, contended, I That the complainants were not perceptibly or appreciably injured by the introduction by the respondents of their refuse drugs and

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dye stuffs into the Woonasquatucket river, in the manner in which it was done by them.

II. That the respondents had a lawful right to empty their refuse drags and dye stuffs into the Woonasquatucket river in the manner in which it was done by them, citing *Snow v. Parsons*, 28 Vt. 459; *Jacobs v. Allard*, 42 id. 303; and Angell on Water-courses, § 140, *d*, and cases cited, pp. 240, 243 (6th ed.), and;

III. That even if the last foregoing points be ruled against the respondents, still where the injury, as in this case, if any existed, was slight, and could be remedied or be compensated in damages, an injunction ought not to issue, more especially when the issuing of the same would work great injury to the respondents.

They represented that the manufacturing establishment of the respondents was a very large one, the amount of investments in mills, machinery, houses, etc., at their works being about \$1,500,000, the number of persons employed about 800, and the amount of the annual product about \$1,500,000; and that the effect of granting an injunction such as now sought by the complainants would be to stop the works of the respondents, as they had no other means of getting rid of their refuse dyes than by discharging them into the Woonasquatucket river, and contended that under these circumstances it was the settled law that an injunction should not issue, but the complainants be left to pursue their remedy at law if they had suffered any injury, citing *Wood v. Sutcliffe*, 2 Sim. (N. S.) 167; *Sparhawk v. Union Passenger Railway Co.*, 54 Penn. St. 401; *Dunning v. Aurora*, 40 Ill. 481; *Thebout v. Canova*, 11 Fla. 143, 172, and cases cited; *Zabriskie v. Jersey City & Bergen R. R. Co.*, 2 Beas. 314; *Attorney-General v. Gee*, Law Rep., 10 Eq. 131; Story's Eq. Juris., § 925; Adams' Eq. s. p. 211, and notes "p" and "q," and cases cited; Angell on Water-courses, chap. iv, § 140 *d*, and cases cited.

POTTER, J. In this case the complainants allege that they are riparian proprietors on the banks of the Woonasquatucket river, and that they and their predecessors in title have owned and maintained certain mills upon the banks of said river since 1838, used by them for bleaching, dyeing, and calico printing, and that until polluted by the respondents the waters of said river were pure and well adapted for said purposes; that (A. D. 1851) the respondent corporation erected a mill upon the banks of said river, above the

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complainants' mills; that (1863) they enlarged their establishment, and have, since that went into operation (1865), emptied into said river the refuse of said mill — dye stuffs, oily and fatty substances — by which the waters of the river have been polluted and rendered unfit for use by the complainants in their said business; their clearness and purity destroyed; their use for ordinary purposes of washing and drinking, and for cattle, prevented; and the water in low stages rendered offensive to smell and injurious to health, by which the complainants have been greatly injured, and obliged, at some times, wholly to abandon some branches of their business. And they pray for a perpetual injunction.

In the trial of the cause a great deal of evidence has been taken, relative to the alleged pollution and the causes of it, and its effects upon the business of the complainants, and specimens of the water taken at various times and places have been analyzed by chemists and exhibited to the court.

The respondents admitted that the water of the river, "when free from foreign substances. was as pure as the water of rivers in this region usually is," and that they had, when necessary, but not continually, emptied their refuse dye stuffs into the river; but denied that they had appreciably injured the water or rendered it unfit for the complainants' use, or that the complainants had been materially injured by it; and also claimed that as riparian proprietors they had a lawful right to use it as they had done.

The respondents also claimed, and introduced evidence to show, that the refuse from certain stables, drains, privies and tanneries have been emptied into the river between the mills of the complainants and respondents, and that the amount of refuse discharged into the river by the respondents was very small compared with the volume of the stream; and they claim that the evidence of the experts shows that the constant tendency of such a stream in running the distance of a mile between the mills would be to purify itself by sediment and by chemical change in the character of the matter discharged into it. And a great deal of evidence has been put in as to the comparative fairness of the various experiments.

It is also claimed by the respondents that the imperfections in the goods manufactured by the complainants may have arisen from other causes; that their goods have sold well, and that they might have protected themselves from all injury by a properly constructed filter.

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The complainants urge that, by the pollution of the water, they have been compelled to abandon the manufacture of the sort of goods they formerly made, and to make goods showing very little white; that if their goods have sold well, it has cost more to make them; that the alleged impurities are not found above the respondents' mills, and that, although all the other alleged sources of impurity, except the stables, were there before 1865, there was no complaint before the respondents erected their large mill (no woollen goods having been made at the respondents' mill from 1856 to 1864, and Taft & Weeden's mill having never since 1866 emptied into the stream any dye-stuffs or the contents of wool washing), and that while, in the spring, the proportion of impurity is of course less, compared with the whole volume of water, the water in its lowest stages is very impure and very offensive.

The respondents do not in fact deny that they have thrown noxious substances into the stream, but they have taken considerable evidence to endeavor to show that others as well as themselves have polluted the water, and that the complainants have not been materially damaged thereby.

We do not propose to recapitulate the evidence. One general remark applies to it, that while the complainants' evidence positively shows the pollution of the water, and that the respondents have been the cause of at least a considerable proportion of this pollution, the evidence on the part of the respondents is of a negative character, going to show that the water is at times purer than at others.

If the respondents have polluted the water, it is no excuse for them that others also have polluted it.

And it is no defense to say that the complainants could have filtered the water at no great expense. The complainants are under no obligation to do this, and the respondents have no right to put them to the expense of doing it.

The principles of law which govern the case are well settled. Riparian proprietors, mill owners or others, have no right to render the water of a stream unwholesome or offensive. Angell on Water-courses (6th ed.), p. 233, § 136.

He has a right to the reasonable use of the water for his own purposes, but he must not do any thing unnecessarily to abridge the use of it to those below him.

The general doctrine is well stated in the opinion of Chancellor



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GREENE, of New Jersey, in the case of *Holsman v. Boiling Spring Bleaching Co.*, 14 N. J. Eq. 335, 338, 342.

That was a suit to restrain defendants from polluting the water by emptying into it the refuse of the bleaching works. In that case the defendants claimed that they had exercised the right for twenty years, and also alleged that they had erected a filter for the purpose of eliminating from the water all injurious substances.

The chancellor examines the points made at length. "Every owner of land through which a stream of water flows is entitled to the use and enjoyment of the water, and to have the same flow in its accustomed and natural course, without obstruction, diversion, or corruption. The right extends to the *quality* as well as to the quantity of the water." And he quotes Chancellor KENT: "The right of the riparian proprietor to the use and enjoyment of a stream of water in its natural state is as sacred as the right to the soil itself."

In that case, the complainants had served a notice on the defendants at the time of building their (defendants') mill, cautioning them against injuring the water; and the charter of the defendant corporation contained a provision that they should not injure the water for domestic purposes. But the court did not consider these facts as affecting the legal rights of the parties.

There is no doubt of the power of the court to issue the injunction prayed for, and we think a proper case is made out for doing it.

*Decree for perpetual injunction.*

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### MOULTON & REMINGTON v. PHILLIPS & SHELDON.

(10 R. I. 218.)

*Bailment — negligence of bailees.*

Plaintiffs stored certain carriages in defendants' barn and paid storage. The carriages were injured by the falling in of the roof of the barn overloaded with snow. *Held*, that defendants were bound to furnish a building which was reasonably safe for such storage, and were liable if it proved to be unsafe, unless the defect was one which they did not know of, and could not have discovered by the use of ordinary care.

ACTION of the case to recover damages for the alleged negligent storing by the defendants of the plaintiffs' carriages in an unsafe building. At the trial of the case at the October term, 1871, of the Supreme Court for this county, before Mr. Justice POTTER and a jury, it appeared that the defendants took for storage the carriages of the plaintiffs at an agreed price, which was paid by the plaintiffs, and that they were crushed by the roof falling upon them, the fall being occasioned by the weight of the snow allowed to collect thereon. A verdict having been rendered in favor of the defendants, the plaintiffs moved for a new trial on exceptions taken to the rulings of the judge presiding at the trial, which are fully stated in the opinion of the court.

*B. N. & S. S. Lapham*, for plaintiffs, in support of the motion, cited Redf. on Carriers and Bailments, 549, § 690, 555, and 556; *Geddes & wife v. Metropolitan R. R. Co.*, 103 Mass. 395; *Francis v. Cockrell*, L. R., 5 Q. B. 501.

*Miner*, for defendants, *contra*, cited 2 Kent's Com. 566, and *Edson v. Weston*, 7 Conn. 278.

BRAYTON, C. J. This action was brought by the plaintiffs to recover of the defendants damages done to the plaintiffs' carriages, stored in the barn of the defendants, by the falling in of the roof overloaded with snow.

On the trial it appeared that the defendants had received the price for storage. What the facts were in other respects, or what other evidence was offered, does not appear.

But the case was submitted to the jury; the judge, before whom the trial was had, was requested to charge the jury, that, if the barn was not reasonably fit and safe for the purpose of storage, the defendants were liable, which instruction the judge refused to give.

From the facts which are disclosed, that the goods were stored in the defendants' building and storage paid by the plaintiffs, the relation of the parties was that the defendant was a depositary for hire of the plaintiffs' goods, and from that relation arose a duty on the part of the defendants to keep them with reasonable care, so that they should not be lost or injured for want of such care as prudent men usually bestow upon their own goods. This is ap-

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plicable to every such bailee, of which class are warehousemen, wharfingers, etc. If they use that degree of care, they are not liable further.

The rule which the judge was requested to give the jury would make every warehouseman, or other such bailee, an insurer against loss for any defect in the building in which the goods were deposited, whether attributable to the negligence of the defendant, or whether discoverable by any ordinary care, and even for defects not discoverable by any amount of care. It ignores the idea of ordinary care. The judge could not give the jury any such rule. It is supported by no authority. The case read at length before us, and upon which reliance was made to warrant a new trial in this case, holds to no further liability in case the building was not reasonably safe, than for defects which could have been discovered by ordinary care, and not latent defects which could not be ascertained with the exercise of such care. In the case of *Francis v. Cockrell*, L. R. 5 Q. B. 501, a building was erected by the defendant, by contract with another person, for viewing a public exhibition, a steeple chase. The plaintiff was admitted to a seat there on payment of 5s. It was in fact improperly and insecurely built. The defect, however, was unknown in fact by defendant, because he did not see the work in its progress and ascertain if his servants did their duty. It was held that, as it was built for that particular purpose and let for that purpose, there was an implied agreement that it was reasonably safe and proper for the use.

But this implied contract did not extend to defects that were unseen, unknown, and undiscoverable by the exercise of reasonable skill and care, by ordinary and reasonable means of inquiry and examination—to defects not existing by the defendants' negligence. KELLY, C. B., and MARTIN, B., agreed in this view, and said it was the duty of a person so holding out a building of this sort to have it fit and proper for the safe reception. KEATING, J., preferred to state the defendant's liability or his undertaking to be that due care, that is, reasonable care, had been exercised in the erection of that stand which he so let out for the use of the public. CLEASBY, B., did not put the decision on the ground of contract, but said: "I think the plaintiff relied upon the thing itself being in a proper state, and as the fault—breach of duty of the defendant—was that it was not in that State, the plaintiff is entitled to recover in this action." MONTAGUE SMITH, J., said: "I

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think, in conformity with the decision in *Redhead v. Midland Ry. Co.*, L. R., 2 Q. B. 412; 4 id. 379, that there was no warranty or insurance that the stand was absolutely safe; but I think that there was an implied undertaking on the part of the defendant that due care had been used in the construction \* \* \* so far as the exercise of reasonable care and skill could make it so." They all held that there was a want of reasonable care in the construction, and with the exercise of such care the defects would have been known, and from negligence they did not know.

In the case of *Brazier v. Polytechnic Institution*, 1 F. & F. 507, the building was altered by defendants after it came into their possession, by which it was weakened and rendered unsafe. They were held liable upon the same principle.

But in another case (*Pike v. Polytechnic Institution*, 1 F. & F. 712), where the building came into defendants' possession with the defects that made it unsafe, existing by the negligence of former proprietors, but unknown to the defendants, they were held not liable, because defects not occasioned by any negligence of theirs and not discoverable by ordinary care. The case, when examined, holds that the parties are bound to use ordinary care, ordinary diligence and attention to the condition of the structure. The difference seems to be in their means of knowledge; if they construct or alter, they must know whether properly done or not, and not to know argues want of care.

Another ground of error stated in the plaintiffs' brief is that the judge, though he refused to charge as requested, did charge the jury, that if the barn was not reasonably fit and safe for the purpose, and the defendants knew it, they would be liable. This direction, so far as it goes, is favorable to the plaintiffs. Its correctness is not questioned. The objection to it is, that as stated out of its connection with other directions given to the jury, and indeed, as the counsel insist, with it, it leaves the implication that the defendants would not be liable, unless they knew the building was unsafe, though it was unknown purely from want of care and diligence which prudent men bestow. The judge, however, had charged the jury as to the liability and duty of one who takes in charge the goods of another, as a warehouseman, and had concisely stated the rule to be that he was bound to exercise ordinary care, which he assumed to be such care as a prudent man would take of his own goods. He had stated further that this ordinary care

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might vary according to circumstances, and in view of the request to charge, and of the authorities then cited and now read, said that more care might be expected when a building was erected purposely as a warehouse, and the owners advertised it as such, and invited custom, and in that case he held it out as suitable for that purpose, and there was an implied understanding that it should not be overloaded, and in such case the language of the request was substantially correct. That the case was different where one had spare rooms, and took the goods of another into them for accommodation; that the person receiving goods on deposit, did not warrant the safety of the building; but if he knew, or had reason to know that it was unsafe, he ought not to take goods on deposit; and in judging if the proper degree of care had been exercised, they might take into consideration the manner of erecting the building, and the fact that defendant exposed similar goods of his own to the same danger. Taking the whole charge, together with all the directions given, we think the jury must have understood that it was not sufficient to relieve the defendant from liability that any defects by which the injury was caused were unknown, if they were such as by ordinary care they might or would have known, which they were negligent in not discovering. The care required extended not merely to providing against dangers known, but to ascertain such as might be seen and known by a prudent man, and ordinary care must be extended to both.

*New trial denied.*

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**PIERCE V. PROPRIETORS OF SWAN POINT CEMETERY.**

10 R. L. 227.)

*Property in dead bodies..*

While a dead body is not property in the strict sense of the common law, it is a *quasi* property, over which the relatives of the deceased have rights which the courts will protect.

The persons having charge of a dead body hold it as a trust which a court of equity will regulate.

The Roman, canon, and English ecclesiastical law, stated.

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**BILL IN EQUITY**, brought by William G. Pierce and Almira F. Pierce, his wife, the latter being the only child and heir at law of Whiting Metcalf, deceased, against the "Proprietors of Swan Point Cemetery," a corporation duly created under the laws of Rhode Island, and against Almira T. Metcalf, widow of said Whiting Metcalf.

The bill alleged, in substance, that Whiting Metcalf died on the 4th day of May, 1856, leaving his daughter, said complainant, Almira F. Pierce, his sole heir at law, and the said Almira T. Metcalf, his widow; that the said Whiting Metcalf, during his life-time, had conveyed to him a burial lot in the First Congregational Society's Burial Ground in Swan Point Cemetery; that he was a Unitarian in religious belief, a communicant of that denomination, and a prominent member of the so-called and well-known "First Congregational Society of the City of Providence;" that the burial lot so purchased by him was one of a "family group of lots," of which group the several lots were owned and held by the brothers and kindred of said Whiting Metcalf; that upon his decease he was buried in said lot, and, as the complainants averred upon belief, in accordance with his wishes and desires expressed during his life-time, and with the approbation of his widow; that he remained so interred for about 13 years; that said lot became immediately after his decease the absolute property, by descent, of the said complainant Almira F. Pierce, his only child, heir at law, and next of kin; that about the 22d of July, 1869, the respondent, Almira T. Metcalf, requested in writing the permission of "the gentlemen having charge of the Unitarian Cemetery for the removal of his remains," setting forth her reasons, viz.: that she had secured a lot in Swan Point Cemetery, and wished to remove to it the remains of her late husband, and there erect a suitable monument to his memory; that such consent was refused "without the written request of the relatives, countersigned by the society's committee;" that afterward the complainants protested to the actuary of the defendant corporation against such removal, positively forbidding the same; and that the filing of said protest was known to the respondent, Almira T. Metcalf, before the removal, as the complainants averred upon information and belief.

The bill further alleged that in 1869 the remains of said Whiting Metcalf were forcibly, without the authority, consent, or approval of the complainants, in violation of the by-laws

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of the defendant corporation, in violation of law, of right, and of the sacredness of the tomb, removed, under the direction of the said respondent, Almira T. Metcalf, from the lot aforesaid, and placed in another lot in said cemetery; that after the body had been removed, and while it was exposed the superintendent of said cemetery did not direct its immediate re-interment, but permitted its interment in the lot to which it had been removed; that on the 9th day of August, 1869, the complainants requested the directors of the defendant corporation to restore said remains to the place whence the same had been taken; that the defendant corporation neglected and refused to comply with such request, but afterward passed a vote declaring that what had been done was in violation of their by-laws; that on the 21st day of February next following, the complainants notified the respondent, Almira T. Metcalf, of their protest before referred to, requesting and desiring her to restore said remains to the place from whence they were taken; that said request had been refused; and that said acts and doings were in direct, absolute and palpable violation of right. The prayer of the bill was that the defendant corporation might be decreed to restore and replace said remains in the lot from whence they were taken, and that the said Almira T. Metcalf might be enjoined from interfering with or in any manner preventing, or attempting to prevent, said restoration and replacement, and also perpetually enjoined from again removing or intermeddling with said remains.

To this bill the respondent, Almira T. Metcalf, filed a general demurrer for want of equity. The proprietors of Swan Point Cemetery filed an answer, in which they denied the jurisdiction of the court to direct or control the management of their internal affairs, or in the subject-matter of the bill, so far as relief was prayed against them, but stated that they believed all the facts stated and charged in the bill to be true, and submitted to execute, or allow to be executed within their grounds, such order and decree in the premises as the court might see fit to enter up between the other parties to the bill.

*B. F. Thurston & John D. Thurston*, for the respondent Almira T. Metcalf, in support of the demurrer. The bill complains that the remains of Whiting Metcalf have been taken from the place where they have rested for thirteen years, and been removed to another lot in the same cemetery and there buried; but it does not

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aver, nor pretend to intimate, that said removal was not done with becoming decency, or that due honor and respect have not been paid to the buried remains in their new surroundings. Indeed, the bill sets forth that, in the written application of Mrs. Metcalf for the removal of the body, she based it upon the reasons that she had "secured a lot of ground in Swan Point Cemetery," and wished "to remove to it the remains of her late beloved husband, Whiting Metcalf, and prepare a suitable monument to his memory." There is nothing to show that this has not been done.

Again the bill, after setting forth that the said Whiting Metcalf was the owner of a certain lot in that part of Swan Point Cemetery known as the First Congregational Society's Burial Ground, adds these words: "The said Whiting Metcalf being an Unitarian in religious belief, a communicant of that denomination, and a prominent member of said First Congregational Society." This statement is either mere surplusage or else it is inserted for the purpose of making it a part of the complainants' case that the religious sentiments of the deceased have in some way been disregarded and violated; that he has been torn from the companionship of his own faith and made to sleep with those who are alien to him in belief. But creeds are for the living, not for the dead, and perhaps, in the new light that is now vouchsafed him, his predilection for Unitarian association may have become somewhat impaired. However this may be, it is certainly not for a court to decide whether it profits a man more or less to be buried under the shadow of any particular creed. To assume jurisdiction over such a question is not to minister to the welfare of the departed so much as to pander to the prejudices of the living.

A careful study of the complainants' bill fails to elicit any sufficient grounds for the relief therein prayed for by them, or in fact any grounds whatever except a pretended disregard of filial affection, and a preference on their part that the remains of the deceased should rest in one particular spot rather than another. Neither of these reasons are of any validity, unless supplemented by the fact that the complainants have a better right to the guardianship of the remains in question than the respondent Almira T. Metcalf. Without discussing immediately in this connection how far the court can aid them, providing they establish such right, it is well, perhaps, to discuss in the first place the question whether such right really exists.



1. In the guardianship of the remains of a deceased person, the marital right prevails over that of the next of kin. The bond of matrimony is the closest of all human ties. Though having its foundation and inception in a civil contract between two hitherto independent individuals, it becomes when executed a relation and a *status*. The rights and obligations growing out of the marriage relation do not cease with the death of one of the parties. The survivorship of such rights and obligations is clearly recognized by the law. Under the statutes of Rhode Island the husband is entitled to the administration of his wife's personal estate in case of her intestacy. Rev. Stat., chap. 156, § 7. And in respect of the particular marital right of custody over the remains of a deceased consort, see *Durell v. Hayward*, 9 Gray, 248.

2. The marital right of such guardianship is in the wife equally with the husband. If the proposition is correct, that it is the "indisputable and paramount right and duty of a husband to dispose of the body of his deceased wife," the converse of that proposition seems equally true. The Revised Statutes, chap. 156, § 4, provide that administration of the estate, both real and personal, of a person dying intestate shall be granted to the widow or next of kin, placing the widow first, and thereby giving her the preference. If the principle is established that the right of custody over the remains of Whiting Metcalf vests in his widow, rather than in his heirs at law, then of course there is an end of the case. They are now under her custody and control. But if the question is still an open one, the respondents contend further as follows:

3. Equity has no jurisdiction except in cases where rights of property are concerned.

The subject-matter of the jurisdiction of the Court of Chancery is civil property. The court is conversant only with questions of property and the maintenance of civil rights. Injury to property, whether actual or prospective, is the foundation on which the jurisdiction rests. The court have no jurisdiction in matters merely criminal or merely immoral, which do not affect any right of property. The possible effect of the acts and conduct of one man on the reputation of another is not a ground for the interference of the court, unless there be an injury to property. *Kerr's Injunctions* in Equity, pp. 1, 2, and cases there cited.

If, then, equity has no jurisdiction except in cases involving the rights of property, it at once becomes a pertinent question as to

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whether there is any right of property in a dead body. Lord COKE, 3d Inst. 203, says: "It is to be observed that in every sepulchre that hath a monument, two things are to be considered, viz., the monument, and the sepulture or burial of the dead. The burial of the *cadaver* is *nullius in bonis*, and belongs to ecclesiastical cognizance; but as to the monument, action is given at the common law for defacing thereof." Compare 2 Black. Com. p. 429; *Meagher v. Driscoll*, 99 Mass. 281.

The case last cited clearly points out where and in what manner the complainants are to seek their remedy, if any they are entitled to. They are not to go to a court of equity, but to a court of law; not to ask for the remedial and preventive relief prayed for in their bill, but to sue for their damages in an action of trespass; not to found their complaint upon the violation of the by-laws of the defendant corporation, or upon a violation of the "sacredness of the tomb," but to base their action upon a trespass *quare clausum fregit* (not *de bonis asportatis*).

4. A court of equity will not intervene in behalf of the complainants to grant the relief by them prayed for, for the reason that the same is against public policy.

*James Tillinghast*, for proprietors of Swan Point Cemetery.

*Browne & Parsons*, for complainants, *contra*. 1. Courts of equity have full jurisdiction, and such jurisdiction has been frequently exercised, to protect and preserve the repose of the dead, and if they can so protect and preserve, they can equally give relief against injury suffered from a disturbance of such repose, particularly if there be no remedy, or an incomplete and inadequate remedy at law. *Beatty et al. v. Kurtz*, 2 Pet. 566; *Price v. Methodist Church*, 4 Ham. (Ohio) 515; *In the matter of the Brick Presbyterian Church*, 3 Edw. Ch. 155; *Wendt v. German Reformed Church*, 4 Sandf. Ch. 471. It may be admitted that the right of a municipal corporation to take burial lots or cemeteries for public uses, such as streets or highways, cannot be restrained. Nor can the right of a church or corporation established under statute, owning a cemetery or burial ground, acting in accordance with law and under legal authority, to sell and dispose of the land for other purposes, be enjoined by the owners of lots. But the above authorities establish the jurisdiction of courts of equity to protect and preserve the repose of the dead, except when the same

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is disturbed for public purposes, or under regular legal proceedings. If they have power and jurisdiction to restrain the disturbance of such repose, they have equal power to grant the relief which may be full, adequate, and proper, after such disturbance has been committed.

In the case at bar there has been committed a public wrong. A dead body has been illegally disinterred. This is an indictable offense. Revised Statutes, tit. 30, chap. 216, § 21; *Commonwealth v. Loring*, 8 Pick. 370; *Commonwealth v. Cooley*, 10 id. 38; *State v. McClure*, 4 Blackf. 328. There has also been a private injury committed for which the complainants have their action of trespass *quare clausum* against both respondents. *Meagher v. Driscoll*, 99 Mass. 281. But this is not full or adequate relief. The complainants have other rights which call upon the protecting power of a court of chancery "to preserve the repose of the ashes of the dead, and the religious sensibilities of the living."

II. The body of Whiting Metcalf, deceased, belonged to his only child and next of kin as property, and she had the right to dispose of it as such, within restrictions analogous to those by which the disposition of other property may be regulated. See Report of Hon. Samuel B. Ruggles, as referee to the Supreme Court of the State of New York, in 1856, "in reference to compensation to owners of vaults in cemeteries, and to relatives of individuals buried in graves, disturbed by legal proceedings."\* The counsel, after quoting fully from this report, cited its conclusion as follows: "It is believed that the following legal principles are justly deducible from the fact that no ecclesiastical element exists in the jurisprudence of this State, or in the framework of its government: 1. That neither a corpse nor its burial is legally subject, in any way, to ecclesiastical cognizance, or to sacerdotal power of any kind. 2. That the right to bury a corpse and to preserve its remains is a legal right, which the courts of law will recognize and protect. 3. That such a right, in the absence of any testamentary disposition, belongs exclusively to the next of kin. 4. That the right to protect the remains includes the right to preserve them by separate burial, to select the place for sepulture, and to change it at pleasure.

\* This report was printed by order of the Senate, Feb. 17, 1858. A portion of it is attached in the form of an appendix to the fourth volume of Bradford's Surrogate Reports, p. 582. It was reprinted in full by the counsel for the complainants, and handed to the court with their brief. It is a very learned and exhaustive treatise on the law of burial, and will prove of great value to members of the profession interested in this subject.

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5. That if the place of burial be taken for public use, the next of kin may claim to be indemnified for the expense of removing and suitably re-interring the remains." See, confirming this report, *Bogert v. City of Indianapolis*, 13 Ind. 138; also, *State v. Tate*, 6 Blackf. 112; *State v. McClure*, 4 id. 328; *Wynkoop v. Wynkoop*, 42 Penn. 293; Amer. Law Review for October, 1871, p. 182; *In re Pope*, 5 Eng. L. & E. 586.

We think we may assert, as an absolute truth in Rhode Island, "that no ecclesiastical element exists in the jurisprudence of this State (Rhode Island), or in the framework of its government." We do not believe that any one would dare to suggest the contrary doctrine. And should this court declare that such contrary doctrine is law to-day, there might be expected a disturbance in the grave of Roger Williams himself. Yet if the doctrine of Coke, that there is no property in a dead body, be law, and if this court sustains it as law, it can be upon no other theory, principle, or practice, than that an ecclesiastical element does exist in this State, and in the framework of its government.

III. The respondent Almira T. Metcalf, the widow of Whiting Metcalf, had no right of property or of *quasi* property in, or control over, the remains of her dead husband. Any and all rights which she may have claimed as widow ceased and determined, if they ever had an existence, on the burial of the body in 1856. *Wynkoop v. Wynkoop*, 42 Penn. 293.

IV. The remedy of the complainants is only by and through a court of equity, and the relief to which they are entitled is that for which they pray in their bill. There is no action or proceeding at law through which adequate relief can be obtained. It can only be had through a court of equity. If there be no "ecclesiastical cognizance" to trammel our courts, if the dead be not wholly "*nullius in bonis*," the right to bury, to watch, to guard, to protect—the right to the absolute custody and control of the dead rests, and must rest, in the next of kin. Such was the Roman civil law, such was the law of the Saxons, such was and is the common law of England, relieved from the idea of ecclesiastical cogri-zance. Such has been declared to be the law of New York, and that declaration has been affirmed in Indiana, Pennsylvania, and Ohio. We ask this court to adopt and declare, as the law of burial in Rhode Island, the law which has thus been declared and affirmed.

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POTTER, J. In this case one of the respondents, Mrs. Metcalf, has removed the body of her husband from its former place of burial in Swan Point cemetery, and claims that she had the right to do so, being, as his widow, entitled to the charge of it. The claim is resisted by his only child, the complainant.

It seems strange that controversies of this sort have not arisen often before. In Europe burials were matters of ecclesiastical cognizance, and the practice of burial in churches and churchyards common. In many parts of New England the parish system prevailed, and every family was considered to have a right of burial in the churchyard of the parish in which they lived, until they removed to another parish. In Rhode Island, from the scattered nature of the population in most parts of the State, it was early the practice to bury upon the family estate, and when the estate was sold the right was generally reserved. Burial grounds of this sort have remained to families for many generations, in many cases from the first settlement, and the dead are brought from a great distance to be buried among their ancestors and kindred. By the civil law of ancient Rome, the charge of burial was first upon the person to whom it was delegated by the deceased; second, upon the *scripti hæredes* (to whom the property was given), and, if none, then upon the *hæredes legitimi* or *cognati* in order. Pothier, Pand. (Paris ed. 1818) vol. 3, page 378; Corpus Juris. Digest, lib. 11, title 7, l. 12, § 4. But a body once buried could not be removed except by the permission, in Rome, of the Pontifical College, and, in the provinces, of the governor. Pothier, *ante*, and Digest, lib. 11, title 7, ll. 8, 39 and 40. And by the Roman law there was a distinction of tombs into *familiaria* into which any member of the family might be admitted, and *hereditaria* for one's self and his heirs. Digest, lib. 11, tit. 7, l. 5. The heirs might be compelled to comply with the provisions of the will in regard to burial. Digest, lib. 5, tit. 3, l. 50. And the Pontifical College had the power of providing for the burial of those who had no place of burial in their own right. Taylor's Civil Law, 4to, 1755, p. 77.

By the canon law, which prevailed in such matters over so large a part of Europe, every one was to be buried in the parish churchyard, or in his ancestral sepulchre (if any), or in such place as he might select. A wife was to be buried with her last husband, if more than one. If a person permanently changed his residence, then he was to be buried in the parish churchyard of his new resi-

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dence. *Corvinus's Jus Canonicum*; Voet ad *Pandectas*, ed. 1731, vol. 1, p. 602.

In England, by their ecclesiastical law, by which this subject was regulated, every person (with exception of traitors, etc.) had a right to be buried in the parish churchyard. And a claim of right by custom to bury as near relatives as possible was held bad. The whole was under the direction of the ordinary, and was of ecclesiastical cognizance. And once buried, the body could not be removed without license from the ordinary. *Burn's Ecc. Law* (8th ed.), vol. 1, 251, 271, 372; *Kemp v. Wickes*, 3 Phillim. 264. And the person who set up a monument, or, on his death, the heir of the deceased, might have an action for injury to it. 1 *Burn*, 373. And the husband was bound to bury his wife. *Jenkins v. Tucker*, 1 H. Black. 90. See, for a full account, Bingham's *Christian Antiquities*, from which much of the historical matter in legal arguments and in reports has probably been taken without acknowledgment.

*Rex v. Stewart*, 12 A. & E. 773, was an application for a mandamus to compel overseers, etc., to bury a person. The court: "It should seem that the individual under whose roof a poor person dies is bound to carry the body decently covered to the place of burial; he cannot keep him unburied, or do any thing which prevents Christian burial; he cannot, therefore, cast him out, so as to expose the body to violation, or to offend the feelings or endanger the health of the living; and for the same reason he cannot carry him uncovered to the grave." The mandamus was refused for other reasons.

The question is new in this State; and we do not know that it has ever occurred in our mother country, and but seldom in the United States. That there is no right of property in a dead body, using the word in its ordinary sense, may well be admitted.\* Yet

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\* By the old English law the body was not recognized as property, but the charge of it belonged exclusively to the church and the ecclesiastical courts (as did also administration of estates). The only common-law remedy for a wrongful removal was by criminal process. In *Rex v. Sharpe*, Dearsly & B. 160; S. C., 40 Eng. Law & Eq. 551, a man was indicted for removing his mother's body from the burial ground of a dissenting church in order to bury it with his father's. Held, that although his motive was good, yet, as he removed it without consent of the congregation or its officers, the indictment should be sustained. The court said that, under the English law, the only protection of a grave, independent of ecclesiastical authority, was by indictment.

It was an offense at common law to remove a body. And it was a felony to steal the shroud or apparel. 3 Inst. 110, 202, 203; 12 Rep. 113; 1 Hale's P. C. 515; 1 Russell's Crim. Law, 414, n. a; 2 Term Rep. 738; American Cases: 13 Pick. 462; 16 id. 37; id. 156: 20

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the burial of the dead is a subject which interests the feelings of mankind to a much greater degree than many matters of actual property. There is a duty imposed by the universal feelings of mankind to be discharged by some one toward the dead; a duty, and we may also say a right, to protect from violation; and a duty on the part of others to abstain from violation; it may, therefore, be considered as a sort of *quasi* property, and it would be discreditable to any system of law not to provide a remedy in such a case.

It is common to speak of the *right of burial*, of a person's *right* to be buried, etc. In the case of *Rex v. Stewart*, before quoted, the court say: "Every person dying in this country \* \* \* has a right to Christian burial; and that implies the right to be carried from the place where the body lies to the parish cemetery."

In *Gilbert v. Buzzard*, 1 Hagg. Con. 348, and S. C., 3 Phill. 335, Lord STOWELL (Sir William Scott) says: "The rule of law which says that a man has a right to be buried in his own churchyard is to be found most certainly in many of our authoritative text writers; but it is not quite so easy to find the rule which gives him the right of burying a large chest or trunk in company with himself. That is no part of his original and absolute right, nor is it necessarily involved in it. That right, strictly taken, is to be returned to his parent earth for dissolution, and to be carried thither in a

id. 304; 1 Greenleaf, 226 (throwing body into river); Dane's Abridg. vol. 3, pp. 13, 4, § 12, and vol. 7, pp. 218, 2, 20. Chitty's General Practice, vol. 1, pp. 50, 95, n., 165, 753, 866.

And as to civil actions, an action of trespass would lie for defacing monument. Co. Lit. 18, b; 1 Chitty, 168; 3 Bingham, 186; 11 E. C. L. 69.

In the United States many cases have been decided as to the rights of vault owners in churches and churchyards. See *Price v. Meth. Ep. Church*, 4 Hammond (Ohio), 515; *Dutch Church v. Mott*, 7 Paige, 77; *Corporation of Brick Presbyterian Church*, 3 Edw. Ch. 155; *Ruggles' Report on Brick Church case*, 4 Bradford's Surrogate, 503; *Windt v. German Reformed Church*, 4 Sandf. Ch. 471.

And the courts in England and in this country interfere by injunction to prevent removal.

In ancient, and even in modern, times, it was the practice to arrest and detain dead bodies for debt. See the Roman law; Burn's Ecc. Law, notes to pages before cited. See also the Statutes of Rhode Island, Massachusetts, etc., forbidding it.

With us the executor or proposed administrator generally superintends the burial. Judge RUSSELL (on Wills, 2, 227, § 10) says it is the duty of the executor or *some one on behalf of the estate*, to see to the funeral rites. Williams (on Executors, 2, 229) expresses it that the executor *must* bury the deceased. In *Haygood v. Houghton*, 10 Pick. 154, the Supreme Court of Massachusetts held that the estate in the hands of the executor was bound for the expenses, and that the law raised an implied promise on the part of the executor or administrator to pay those who supplied the necessary expenses, so far as he had assets in his hands. Very much the same doctrine was held in *Campfield v. Ely*, 1 Green (New Jersey Law), 150. By the Revised Statutes of Rhode Island, 1864, ch. 158, § 7, p. 370, funeral charges have the same preference. See 1 Hawks, 304, and 2 Dev. 21.

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decent and inoffensive manner. When these purposes are answered, his rights are perhaps fully satisfied in the strict sense in which any claim in the nature of an absolute right can be deemed to extend.\* So Dr. Burn, quoting Gibson's *Codex Juris Ecclesiæ Anglicanæ*, says: "Every parishioner hath and had always a *right* to be buried in" the parish burial ground. 1 Burn's *Ecc. Law*, 257.

Most people look forward to the proper disposition of their remains, and it is natural that they should feel an anxiety on the subject. And the right of a person to provide by will for the disposition of his body has been generally recognized. We have seen that by the canon law a person had a right to direct his place of sepulture. Voet, *ante*. Now, strictly speaking, according to the strict rules of the old common law, a dead man cannot be said to have rights. Yet it is common so to speak, and the very fact of the common use of such language, and of its being used in such cases as we have quoted, justifies us in speaking of it as a right in a certain qualified sense, and a right which ought to be protected. See 1 Chitty's *General Practice*, \* 50, note. And a sort of right of custody over, or interest in the dead body, in the relatives of the deceased, is recognized in the statutes of many of our States. The laws of Indiana (R. S., chap. 7, § 37) prohibit the removal of a dead body without the consent of the near relatives, or without the

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\* The case of *Gilbert v. Buzzard* was a suit for refusal to bury the complainant's wife in an iron coffin. It was in some measure a dispute about the amount of fees to be paid. It being contended that, if iron coffins were used, the parish yard would soon be wholly occupied, so that it could not be used over again, and thus future burials there prevented. The cemetery was not the property of one age only. Evidence was taken to show the comparative length of time different woods and metals would endure.

In *King v. Coleridge*, 2 B. & Ald. 806; S. C., 1 Chitty, 588, which was substantially the same case as above, it was held that a mandamus might issue if burial was refused, but that the *mode* of burial was exclusively of ecclesiastical cognizance.

Lord ABINGER, in *Russel v. Smith*, 9 M. & W. 818, says the maxim should be interpreted "to amplify the remedies of the law." Lord MANSFIELD, in *Rex v. Phillips*, 1 Burrow 804 (quoted from Broom's *Maxims*), says the true reading is "*ampliare justitiam*." Sir JOSEPH JEKYL, in *Bell v. Hyde* (Finch's *Precedents*, 329), said "it was a saying of a very great man, '*boni judicis est ampliare jurisdictionem*;' and he thought to extend the arm of justice further than usual, when otherwise there would be a failure of justice, was the duty of every court."

The maxim was attributed to Lord BACON, but is older than his time. He mentions it as a common saying. Aphorism, 96, on *Universal Justice*, book 8 of *De Augmentis*, Spedding's ed., vol. 9, p. 341.

See also Code Napoleon, tit. prelim., § 4, discussed in Loche, *Legislation de la France*, vol. 1, 263, 370, 401, 417, 433, 480, 524, 556, 583, 601, 613; Code of Louisiana, Morgan's ed. 1853, tit. prelim., chap. 4, art. 21; Papers of the Juridical Society, vol. 1, pp. 108, 416.



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consent of the deceased, given in his life-time. See also *State v. Tate*, 6 Blackf. 111. The laws of Louisiana and California recognize the interest of the relatives of the deceased in the body. Tyler's Am. Ecc. Law, §§ 1153 and 1228. So also the laws of Connecticut. Laws of 1849, p. 250, § 137; Laws of Vermont, 1862, p. 129, title 11, chap. 18, § 8; Laws of Ohio, Swan's Revised Statutes, 1854, p. 294. And see also the late English Statute of Burials, 15 and 16 Victoria, chap. 85, §§ 32 and 33; Baker's Laws relating to burials. See, as to the various meanings of the word right, Austin's Province of Jurisp., vol. 1, § 6, p. 292. See also bill of rights, § 5: "Every person ought to find a certain remedy for all injuries," etc.

It has been the boast of many of the sages of the law that there is no wrong without a remedy. Says Lord COKE (Co. Lit. 197, b, 1 Thomas's Coke, 902): "The law wills that, in every case where a man is wronged and endangered, he shall have a remedy." Lord HOLT, in *Ashby v. White*: "If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it." \* \* \* "It is a vain thing to imagine a right without a remedy." Lord. Raym. 938; S. C., 6 Modern, 45; Judgment of Lord HOLT in *Ashby v. White, etc.*, reprinted, 1837; 1 Smith's Lead. Cases, \*342, \*356. And see Lord ABINGER's interpretation of the old maxim, "Bonis iudicis est ampliare jurisdictionem." And the late Chief-Justice AMES has well expressed it in his opinion in the case of *Reynolds v. Hoxie*, 6 R. I. 463, 468, that it is perfectly understood that there cannot be a wrong under our jurisprudence for which the law does not in some form provide a remedy.

And in the report upon the codification of the laws in Massachusetts, December, 1836, made by Joseph Story, Theron Metcalf, Simon Greenleaf, Luther S. Cushing, and C. E. Forbes, they say

"In truth, the common law is not in its nature and character an absolutely fixed, inflexible system, like the statute law, providing only for cases of a determinate form, which fall within the letter of the language, in which a particular doctrine or legal proposition is expressed. It is rather a system of elementary principles and of general juridical truths, which are continually expanding with the progress of society, and adapting themselves to the gradual changes of trade and commerce, and the mechanic arts, and the exigencies and usages of the country. There are certain fundamental maxims in it which are never departed from.

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There are others again which, though true in a general sense, are at the same time susceptible of modifications and exceptions, to prevent them from doing manifest wrong and injury.

"When a case, not affected by any statute, arises in any of our courts of justice, and the facts are established, the first question is, whether there is any clear and unequivocal principle of the common law, which directly and immediately governs it and fixes the rights of the parties. If there be no such principle, the next question is, whether there is any principle of the common law which, by analogy or parity of reasoning, ought to govern it. If neither of these sources furnishes a positive solution of the controversy, resort is next had (as in a case confessedly new) to the principles of natural justice, which constitute the basis of much of the common law; and if these principles can be ascertained to apply in a full and determinate manner to all the circumstances, they are adopted, and decide the rights of the parties. If all these sources fail, the case is treated as remediless at the common law, and the only relief which remains is by some new legislation by statute, to operate upon future cases of the like nature."

The very origin of equity in Rome and in England was that there was a wrong for which there was no remedy, or no adequate remedy at law. 1 Story's Eq. Jur., §§ 49 and 50. And we cannot but approve the language of Lord COTTENHAM in *Walworth v. Holt*, 4 Myl. & C. 619: "I think it the duty of this court to adapt its practice and course of proceeding to the existing state of society; and not, by too strict an adherence to forms and rules established under different circumstances, to decline to administer justice and enforce rights for which there is no other remedy. \* \* \* \* If it were necessary to go much further than it is, in opposition to some highly sanctioned opinions, in order to open the door of justice in this court to those who cannot obtain it elsewhere, I should not shrink from the responsibility of doing so." Quoted in Story's Eq. Jur. vol. 1, § 671, note.

In *Kurtz v. Beatty & Ritchie*, 2 Pet. 566, 584, which was to obtain an injunction to prevent the removal of tombs and graves, Judge STORY, in giving the opinion of the United States Supreme Court, says: "It is a case where no action at law \* \* \* could afford an adequate and complete remedy. \* \* \* The remedy must be sought, if at all, in the protecting power of a court of

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chancery — operating by its injunction to preserve the repose of the ashes of the dead and the religious sensibilities of the living.”

In cases like the present no common-law action could avail much. The owner of the lot might have trespass *quare clausum*, etc., but he could only recover damages in money. He might have an action of detinue for the body, or so much earth, etc., taken away; or perhaps might have replevin; if buried by permission on another's land, it might perhaps be considered a license or easement, for disturbance of which the person who procured the burial might have an action; but it is easy to see that neither form of action affords a sufficient remedy, or could with any certainty restore the body to the proper custody.

Equity only can give a full and complete remedy, and we think the jurisdiction is fully adequate to it.

It seems the deceased Mr. Metcalf purchased a burial lot, and was, on his decease, with the consent of his widow, one of the respondents, and, the complainants say they believe according to his own wishes, buried in it. The respondent, Mrs. Metcalf, has demurred to the bill, thus admitting these alleged facts, for the purpose of the present hearing. Taking these allegations as uncontradicted and true, as the body was removed by the widow, without the consent of the child, from a place where it was deposited by his own wishes and her consent, we think it should be restored to the place whence it came.

It is not necessary to decide at present what might have been done if the child had assented, or what the child might do of herself. And from the view we take of the case it is of less consequence to whom the custody is given.

Although, as we have said, the body is not property in the usually recognized sense of the word, yet we may consider it as a sort of *quasi* property, to which certain persons may have rights, as they have duties to perform toward it, arising out of our common humanity. But the person having charge of it cannot be considered as the owner of it in any sense whatever; he holds it only as a sacred trust for the benefit of all who may from family or friendship have an interest in it, and we think that a court of equity may well regulate it as such, and change the custody if improperly managed. So in the case of custody of children, certain persons are *prima facie* entitled to their custody, yet the court will interfere and regulate it. We think these analogies furnish a rule for such a case, and one which will probably do most complete justice,

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as the court could always interfere in case of improper conduct, *e. g.* preventing other relatives from visiting the place for the purpose of indulgence of feeling, or testifying their respect or affection for the deceased.

The complainants further charge that after the body had been surreptitiously disinterred by Mrs. Metcalf, and had been surreptitiously removed by her to the newly-prepared grave, the superintendent of the defendant corporation, upon his attention being then for the first time called to the matter while the body was thus exposed, did not direct its immediate reinterment in the lot from which it had been taken, but permitted and allowed it to be interred in the new grave which Mrs. Metcalf had had prepared for it in the lot to which it had been removed; and therefore pray that said corporation may be directed to restore the remains to the lot from which they were removed, and that said Mrs. Metcalf be enjoined from interfering therewith. The defendant cemetery corporation has answered, admitting the statements of the bill, and while denying the jurisdiction of the court to direct or control the management of the internal affairs of the corporation, submitting to execute or permit to be executed such decree as the court may make in the premises.

Consent of course cannot give jurisdiction. But we think there is no doubt of the jurisdiction of the court in this case. This corporation holds these lands for certain purposes, and for those only. They have no doubt a certain control over the property, but that control is to be exercised in such manner as to carry out, at least not to interfere with, the legal rights of those who hold burial lots under them. They are in fact trustees for certain purposes, and when the trust is not properly executed, this court has the same jurisdiction to compel its execution as in case of any other trust.

The demurrer of Mrs. Metcalf, the respondent, is overruled. She can answer and contest the allegations of the bill if she chooses to do so.

*Demurrer overruled.*

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Wilcox v. Emerson.

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## WILCOX v. EMERSON.

(10 R. L. 370.)

*Judicial sale.*

Where the land of one person is transferred to another under an execution, it must appear from the officer's return that he has proceeded according to the statute, and, if it does not so appear, the defect cannot be supplied by evidence *aliunde*.

TRESPASS and ejectment to obtain possession of a lot of land with the improvements thereon, situated in the village of Pawtucket, bought by the plaintiff at a constable's sale upon an execution against the defendant issuing from a justice's court at the suit of one David G. Allen. A jury trial having been waived, the case was submitted to the court both in fact and law. The plaintiff offered in support of his title the execution in said suit of *Allen v. Emerson*, with the officer's return thereon. The return was as follows:

“PROVIDENCE, S. C., NORTH PROVIDENCE, *May 7, 1863.*

“I have this day at twelve o'clock noon levied the within execution on all the right, title and interest of the within named defendant in and to the following described real estate (describing it), and have left a copy of the within execution, with my doings thereon, with the town clerk of North Providence. I have also set up notifications of said levy on said real estate in three public places in said town of North Providence, to wit, one at the town clerk's office in said town of North Providence, one at Dispeau & Childs, and one at the railroad depot, and that the same will be sold at public auction to be held at the town clerk's office in the village of Pawtucket, North Providence, on the 10th day of August, 1863, at 10 o'clock in the forenoon.

(Signed)

“ANSEL CARPENTER,

“*Constable.*”

“In pursuance to advertisement I have this 10th day of August, 1863, sold the above property to Randall B. Wilcox, who was the highest bidder, for the sum of \$24,1<sup>1</sup>/<sub>10</sub>, which I have applied to the

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satisfaction of the said execution, and hereby return this execution satisfied for debt and costs.

(Signed)

"ANSEL CARPENTER,  
"Constable."

The defendant objecting that the officer's return was defective, inasmuch as it did not appear from it that the estate had been advertised for sale, as required by the provision in Rev. Stat., chap. 195, § 11, that the officer charged with the service of an execution, if he levy it on real estate, shall notify the same "by causing an advertisement thereof to be published, once a week, for the space of three weeks next before the time of such sale, in some newspaper in the county where said estate lies," the case was now heard on the question of the sufficiency of the officer's return, and of the right to introduce evidence to show that the sale had been duly advertised, notwithstanding it did not so appear in the officer's return.

*T. C. Greene & P. E. Tillinghast*, for plaintiff.

*Payne*, for defendant.

DURFEE, J. This is an action of trespass and ejectment, which is heard by the court on law and fact, the jury trial being waived. The plaintiff claims the land in suit, as a purchaser at an execution sale, and produces in evidence, in support of his title (besides other testimony), the execution with the officer's return thereon. The return, however, does not show an advertisement of the sale published for three weeks previous to the sale, as required by Rev. Stat., ch. 195, § 11; and the plaintiff offers to prove a compliance with the statute by evidence *aliunde*, though he claims that the return is sufficient as it stands.

In Maine, *Monroe v. Reding*, 15 Me. 158; *Jackson v. Woodman*, 29 id. 266; New Hampshire, *Mead v. Harvey*, 2 N. H. 495; *Libbey v. Copp*, 3 id. 45; *Avery v. Bowman*, 39 id. 392; Vermont, *Cleveland v. Allen*, 4 Vt. 176; *Sleeper v. Newbury Seminary*, 19 id. 451; Massachusetts, *Williams v. Amory*, 14 Mass. 20; *Litchfield v. Cudworth*, 15 Pick. 23, 28; and Connecticut, *Metcalf v. Gillet*, 5 Conn. 400; *Bissell v. Mooney*, 33 id. 411, it is held that where the land of one person is transferred to another under an execution, it must

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appear by the officer's return, either expressly or by necessary inference, that he has proceeded according to the statute, and that, if it does not so appear, the defect cannot be supplied by evidence *aliunde*. In the unreported case of *Hazard v. Clegg*, decided by this court a few years ago at Newport, the rule declared in these cases was recognized as the law of this State. Several cases, however, have been cited for the plaintiff, in which it has been held that it is not necessary for the purchaser at an execution sale, in support of his title, to do more than prove the judgment and levy, and produce the sheriff's deed — the order of proceeding prescribed by the statute being considered as simply directory to the officer. In this view, the title of the purchaser is not affected even by the entire omission of the officer to make any return. We are not prepared to adopt this view. We think the power of the officer to transfer the estate, being derived from the statute, can be validly executed only in the manner prescribed by the statute; and that if the officer omit to set up the notifications and publish the advertisement as required, his deed (unless it can be and is aided by a false return) will be ineffectual to pass the title. The officer's compliance with the statute must also be proved by the person claiming under his deed; it will not be presumed. Can this proof be made otherwise than by the return? The service of the execution is an official act, and the return is the official record of that act required to be made by the officer as a part of his duty. Then, is not such record the proper, and the only proper evidence that, in the service of the execution, the statute has been duly observed? Injustice, doubtless, may arise if a defective return can in no case be aided by testimony *aliunde*; as injustice may sometimes, doubtless, arise from the rule that the acknowledgment of the deed of a married woman can only be proved by the magistrate's certificate; but on the other hand, it is to be remembered that if testimony *aliunde* were to be admitted, its admissibility would have a tendency to introduce the uncertainties and provocations to litigation which are the natural results of making the titles of real estate dependent upon parol testimony. We are of the opinion that the rule of the New England States, recognized by this court in *Hazard v. Clegg*, is upon the whole the more consonant with legal principle; and we therefore decide that the return as it stands is defective, and that the defect cannot be supplied by testimony *aliunde*.

*Judgment accordingly.*

## CHAPMAN V. COOK.

(10 R. I. 304.)

*Highway — duty of town to fence.*

A town is not ordinarily bound to fence its roads, and where a highway connected with a private way, and there was a defect in the private way some fifty to one hundred feet from the junction of the two ways, *it was held*, that the town was not liable for an accident happening to one who drove off by mistake upon the private way and was injured by reason of such defect, although there was no fence or other mark to show the deviation of the private way.

ACTION of the case to recover damages of the town of Cumberland for alleged negligence in not keeping a highway known as Blackstone street in a safe condition.

At the trial of the case at the present term of the court, before Mr. Justice POTTER and a jury, a verdict was rendered for the defendant, whereupon the plaintiff alleged exceptions and moved for a new trial. The exceptions, and the facts of the case, are stated in the opinion of the court.

*C. P. Robinson*, for plaintiff, in support of the motion. I. Towns are liable for injuries resulting from defects outside the line of the highway, but near the same, and in the general direction of the line of travel. *Coggswell v. Lexington*, 4 Cush. 307; *Hayden v. Attleborough*, 7 Gray, 338; *Palmer et al. v. Andover*, 2 Cush. 600; *Currier v. Lowell*, 16 Pick. 170; *Davis v. Hill*, 41 N. H. 329; *Sparhawk v. Salem*, 1 Allen, 30.

II. A town is bound to fence in a dangerous spot immediately contiguous to a highway in a compact part of a city or village, more particularly when the dangerous spot invites the traveler to enter it, from its similarity to the true highway. *Taylor v. Peckham*, 8 R. I. 352.

*Edwin Aldrich*, for defendant, *contra*.

BRAYTON, C. J. The plaintiff was traveling in her carriage in the night-time along a public street in the town of Cumberland,



called Blackstone street, and had reached a point thereon near a bridge, by which the street crossed over the railway and over a deep cut therein. The deep cut extended a long distance from the bridge and beyond the place of the injury complained of. At the point which the plaintiff had reached there was a private way leading off to the right from the street, nearly at right angles thereto, and extended to a school-house, and along by it to another highway beyond. The private way, some fifty to one hundred feet from the street, led along near and in dangerous proximity to the deep cut in the railroad. This way had existed in the same place, and travelers had passed safely there, long before the construction of the railway. There was some fence on the line of the street next the bridge, and extending toward the private way some ten or twelve feet. At a considerable distance beyond the bridge there was another, a public way, leading off also to the right, nearly at right angles with the street.

On arriving at the point near the bridge she turned off into the private way, supposing it to be the public way beyond the bridge, which she had intended to take when she came to it. Leaving the street, she passed some fifty to one hundred feet safely, until she came in sight of the school-house, by which she discovered that she had mistaken the way and taken a wrong road; and here, in attempting, without getting out of the carriage, to turn the horse round and to regain the street, she was precipitated into the railway cut and received the injury. At this point the way was narrow and the carriage rut only a few feet from the bank, and turned gradually off from the railroad. The town put no railing or barrier along the way at this point, or indeed anywhere along the private way. There was evidence also that with the railing near the bridge of twelve feet in length people might without warning drive into the cut next the bridge and contiguous to the street.

In this state of the evidence the plaintiff requested the court to instruct the jury that, in such a compact portion of the town, it was the duty of the town to provide a railing or barrier to prevent travelers, exercising ordinary care, from driving off the highway into dangerous spots contiguous to it; and it is made a ground of exception that he did not give this instruction as to dangerous spots without the line of the wall, but contiguous.

Were the dangerous spot where the injury was received not confessedly so far distant from the street that in no proper sense can it

be said to be contiguous, this might furnish ground of exception. But the facts stated and allowed call for no such instruction. Another instruction asked was given, viz., that the town was bound to provide railing against such dangerous places within the highway. Another instruction asked, as stated in the fourth request named in the exceptions, was not given. It was: "If the jury believed that the direction of the turn at the passway (private way), and at the highway beyond the bridge near Edward Harris's were similar, and the town knew that the passway was dangerous, it was bound to fence up the passway." We do not think the judge should have instructed the jury in the general terms stated in this request. Towns are required to keep their highways in such condition that people exercising ordinary care, reasonably prudent men may pass along them with their horses, teams, and carriages, with safety and convenience, and may with such care be enabled to keep within the line of the highway, without being in danger of falling off, or going off, without the limit of the highway, into danger that may be contiguous to it, as ponds, sloughs, cellars or excavations, down precipices, against their will, when they would keep within the way as laid. The pit, or the cellar, or the excavation, outside the way, is not, properly speaking, a defect in the way. The defect in such case, if there be any, is that no provision is made in the construction or reparation to enable the traveler to avoid such danger by keeping in the way, in other words, to continue in the use of the way as a traveler thereon.

In *Hayden v. Attleborough*, 7 Gray, 338, a railing beside the highway was necessary to prevent travelers from going off. There was no danger while he used the way. *Shearman & Redfield on Negligence*, § 391, say, where a rail is necessary for security of travelers, when otherwise unsafe, and maintaining it would prevent the injury, it is negligence not to construct and properly maintain it. *Collins v. Dorchester*, 6 Cush. 396, was cited to this point, that towns were not ordinarily bound to fence highways, but if necessary to safety at a place otherwise unsafe with ordinary care, a town is bound to maintain a railing.

So in *Alger v. Lowell*, 3 Allen, 402. The plaintiff was pushed by the crowd in the street upon a dangerous declivity *next the street*, where there was no fence to guard against the danger recurring in a crowded street. The street was liable to be crowded, and there was risk of passers-by being thrown or falling into the danger-

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ous place. In *Norris v. Litchfield*, 35 N. H. 271, a bridge had no railing to protect travelers from falling off into the stream. In *Chicago v. Gallagher*, 44 Ill. 295, the way led along a precipice having no guard to prevent falling down. Another case is that of *Ireland v. Oswego, etc., Turnpike Company*, 13 N. Y. 526. The company laid a new track, diverging somewhat from the old, near the place of the injury. The new track was safe, the old was dangerous. The wall was so left as to mislead a person of ordinary care. There was nothing to guide him so that he would keep the new track rather than the old and dangerous one, and to run upon the embankment left there, and the court held them bound to have something to turn the traveler from the unsafe track.

In *Palmer v. Andover*, 2 Cush. 600, there was a bank wall next a mill pond at the foot of a hill and at a turn in the wall to reach a bridge. There was no barrier upon this wall to prevent persons going straight forward from falling over the wall into the pond. This the traveler was liable to do, and the court held that it was the duty of the town to guard against this danger to the traveler in the use of the highway. He was in danger, while on the highway, of going off.

In *Sykes v. Paulet*, 43 Vt. 446, the plaintiff left the highway with his horse and wagon and went safely into a shed of a public house near. From this shed there was a descent to the river outside the highway, and when the plaintiff would return to the highway his horse backed down the descent, where there was no railing to prevent it. The court said that the plaintiff must show the defect to be within the limit of the highway, and that the liability of the town never extended beyond the requirement to keep the way reasonably safe against such accidents as are likely to occur in using the highway for travel. A person traveling along the highway was in no danger from this descent. The condition of the highway neither forced the plaintiff there, nor led him to go there. He did not meet the accident in the use of the road, which he had voluntarily left.

In *Sparhawk v. Salem*, 1 Allen, 30, the highway called Bridge street was safe. The land contiguous was safe and convenient. The defect alleged was that there was no fence on Bridge street. The street adjoined land of a railroad company, and their station was forty feet from the line of the street; but at the end of their station was an embankment. The traveler passed off the street

across this forty feet to the end of the station, and down the embankment, and was thereby injured. The judge declined to instruct the jury that there was no defect in Bridge street, and it was held error not to have given them such instruction. And the court say that no case has been cited (and we may say the same here) which sanctions the doctrine that a railing is necessary to prevent travelers from straying out of the highway, when no unsafe place is *contiguous*, so as to make it dangerous to travel *in the way* itself next to it. That the private way which the plaintiff took left the street in the same direction and at the same angle with it as the public way which she designed to take, would not, in our judgment, add to the liability of the town, nor would the fact that in other respects the private way where it departs from the street resembled the public way beyond. It is not the duty of the town to point out private ways.

There is nothing in the street or in its construction that would lead to any mistake as to the way. The mistake is caused by the construction of the private way. He who makes such a way, makes it in such manner as he chooses. It is entirely separate and distinct and independent of the street.

Neither do we think that the knowledge that the private way is dangerous can add to the liabilities or the duty of the town. Its dangers are not the dangers of the public way. Its defects are not the defects of the street. It does not affect the safety of the person who is traveling in the public way, and while he is traveling upon it. The town cannot stop the private way or prevent any person, who will, from traveling there, however dangerous it may be. If he will go there voluntarily, he goes at his own risk.

But the plaintiff confessedly, according to the statement of the exceptions, traveled from this street not less than fifty feet, and it may be one hundred and fifty feet, safely, before reaching the danger into which she fell, and quite as far as, nay, much farther than the plaintiff in the case of *Sparhawk v. Salem*, 1 Allen, 30. She voluntarily left this street, in pursuance of her purpose when she entered upon it, intending to use it no longer. From this time all duty of the town toward her ceased, and it became entirely immaterial to her whether the public street was safe or unsafe. There was no error in refusing the instruction here asked.

The plaintiff excepts to the charge as given to the jury in this, as stated in the exception, that a town is not bound to fence its

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highways, nor to provide against dangerous spots, barriers, or railings, except at such dangerous spots, stones, posts, or obstructions, as it has itself made and caused.

The first instruction, as to the duty of fencing, is not open to objection. There is no case that holds that towns are bound in duty to fence their highways. The last, that they are not bound to provide against dangerous spots, except such dangerous spots as the towns have themselves made and caused, does not express fully their duty. They are bound to provide against such as may have been caused by others or by the elements.

Had the evidence raised any question as to dangerous spots within the lines of the street, or without the lines but contiguous thereto, by which the plaintiff was injured, and whether they were caused by the town or by other persons, the direction might be material. But by the statement the injury was not caused by any dangerous place within or contiguous to the street, and the failure of the judge to state the whole duty of the town in this respect could not have affected the verdict, and, had the whole been stated, the verdict must have been the same.

*New trial denied.*

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KAVANAUGH V. DAY.

(20 B. L. 302.)

*Interest — law of place.*

Where bonds, and a mortgage to secure payment thereof, are made in New York between parties resident there, and no provision is made for the payment of the bonds elsewhere, they are presumably to be paid in New York, and interest is to be computed according to the laws of that State, although the mortgage given to secure them is made upon real estate in Rhode Island. And where the interest is payable, not as interest, but as damages for the non-payment of the bonds at their maturity, the same rule applies, and interest is to be computed according to the laws of the place where default is made.

BILL IN EQUITY to foreclose two mortgages upon land belonging to one Eliza H. Day.

The case came before the court upon the respondent's exceptions to the master's report. The master's report found that the sums

specified in the bonds, to secure which the mortgages were given, were to bear interest from date; that at the date of said instruments the parties to this suit were all residents of the State of New York, and that all the papers were executed in that State, although the land covered by said mortgages was in East Greenwich, R. I. The report further found that at the date of said instruments, and up to the time of said report, the legal rate of interest in the State of New York was and had been seven per cent per annum. Upon these facts the master computed interest upon the bonds at the rate of seven per cent per annum, and to this computation the respondent excepted.

*Metcalf*, for respondent, in support of the exception, contended that although the bonds and mortgages, being made in New York, would, if enforced there, carry interest at New York rates, yet the complainant having no stipulation as to interest, and choosing to resort to Rhode Island courts, could only recover what the Rhode Island statute gives him, and six per cent interest only should be computed and allowed, citing *Ayer v. Tilden*, 15 Gray, 178; *Ives v. Farmers' Bank*, 2 Allen, 236; *Andrews v. Pond*, 13 Pet. 65, 78; *Cooper v. Waldegrave*, 2 Beav. 282.

*Browne & Congdon*, for complainant, *contra*, to the point that the law of New York should govern in the computation of interest, and that the fact that the land mortgaged was situated in Rhode Island did not affect the rule, cited *Story's Conf. of Laws*, §§ 294, 295; *Consequa v. Fanning et al.*, 3 Johns. Ch. 587; *Pearce v. Wallace*, 1 Har. & J. 48; *Cowqua v. Lauderbrun*, 1 Wash. C. C. 521; *Bushby v. Camac*, 4 id. 296; *Winthrop v. Carleton*, 12 Mass. 4; *Smith v. Smith*, 2 Johns. 235; *Lanusse v. Barker*, 3 Wheat. 101; *Jaffray v. Dennis*, 2 Wash. C. C. 253; *Archer v. Dane*, 2 W. & S. 327; *De Wolf v. Johnson et al.*, 10 Wheat. 367; *Potter v. Tallman*, 35 Barb. 182; *Findley v. Hall*, 12 Ohio (N. S.), 610; *Little v. Riley*, 43 N. H. 109; *Butler v. Meyer*, 7 Ind. 77; *Lougee v. Washburn*, 16 N. H. 134; *Dolman v. Cook*, 14 N. J. Eq. 56; *Sumner v. Mills*, 20 Texas, 77.

DURFEE, J. Interest upon a contract for the payment of money, where it is payable as interest by the terms of the contract, is to be paid according to the law of the place where the contract is made,

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unless it is elsewhere to be performed. The bonds, secured by the mortgage here in suit, were made in New York between parties resident there, and, as they make no provision for payment elsewhere, were presumably to be paid in New York. Accordingly interest on them, if payable as interest, would have to be paid at the legal rate in New York, the fact that they are secured by a mortgage of real estate in Rhode Island being ineffectual to vary the rule. *De Wolf v. Johnson*, 10 Wheat. 337; *Lockwood v. Mitchell*, 7 Ohio St. 387; *Varick's Ex'r v. Crane*, 3 Green's Ch. 128; *Dolman v. Cook*, 14 N. J. 56; *Cotheal v. Blydenburgh*, 1 Halst. 17; *Stapleton v. Conway*, 3 Atk. 727.

The interest, however, is payable not as interest, there being no stipulation for interest in the bonds, but as damages for the non-payment of the bonds at their maturity; and the counsel for the defendants contends that where interest is to be paid as damages, it is to be computed at the rate established by the law of the place where the suit is brought, and not at the rate established by the law of the place where the contract was made or to be performed. The cases cited show that such is the rule in Massachusetts. *Ayer v. Tilden*, 15 Gray, 178; *Ives v. Farmers' Bank*, 2 Allen, 236. The case of *Cooper v. Waldegrave*, 2 Beav. 282, does not show that such is the rule in England. In that case the question was at what rate interest was payable on three bills of exchange drawn in Paris and there accepted, but payable in London. No particular rate of interest was stated to be payable on the face of the bills. The holder of the bills, in a suit in England against the acceptor, claimed interest at six per cent, the legal rate in France. The court decided that English interest at the rate of five per cent should be paid. The reason given for the decision was, that interest was given as compensation for non-payment in England and for the delay suffered there, and that the law of the place where the default happened must govern the allowance of interest arising out of the default. The inference is that if the default had happened in another place, the interest would have been allowed at the rate established by the law of such other place.

In *Gibbs v. Fremont*, 9 Exch. 24, a bill of exchange, on the face of which no interest was reserved, was drawn in California upon a drawee at Washington, and protested for non-acceptance. In an action by the indorsee against the drawee, in the Court of Exchequer in England, the plaintiff recovered interest, by way of

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damages, at the rate of 25 per cent, being the rate payable in California. The question considered was whether the plaintiff should have interest at the rate current in Washington or in California, no claim even being advanced that only the much lower English rate was to be paid. The court followed the decision in *Allen v. Kemble*, 6 Moore's P. C. 314, in which it was said that the drawer of a bill of exchange "is liable for payment of the bill, not where the bill was to be paid by the drawee, but where he, the drawer, made his contract, with such interest, damages and costs, as the law of the country where he contracted may allow." See, also, *Ekins v. East India Company*, 1 P. Wms. 395, and 1 Eq. Ca. Abr. 288 (E).

In *Pecks v. Mayo*, 14 Vt. 33, the defendants were sued in Vermont as indorsers of a promissory note, drawn in Canada, indorsed in Vermont and payable in New York at a day certain, without interest reserved. The court held that interest was recoverable as damages at the rate of seven per cent, being the New York rate, and one per cent higher than the rate in Vermont or Canada. The ground of the decision was that the defendants had made default in New York, the view of the court differing in that respect from the view which was taken in *Gibbs v. Fremont*. The language used by Justice REDFIELD, in delivering the opinion of the court, was, that on a contract to pay money at a certain time and place, where no interest is reserved, and there is a delay of payment, "interest by way of damages, shall be allowed according to the law of the place of payment, where the money may be supposed to have been required by the creditor for use, and where he might be supposed to have borrowed money to supply the deficiency thus occurring, and to have paid the rate of interest of that country." This view is supported by many other cases. *Foden v. Sharp*, 4 Johns. 183; *Beckwith v. Trustees of Hartford, Providence & Fishkill R. R.*, 29 Conn. 268; *Cowqua v. Lauderbrun*, 1 Wash. C. C. 521; *Jaffray v. Dennes*, 2 id. 253; *Evans v. White*, Hemp. 296; *Pauska v. Daus*, 31 Tex. 67, 73; *McAllister v. Smith*, 17 Ill. 328.

We think the rule which allows interest according to the law of the place where default is made, in a case where interest is recoverable as damages, is the more reasonable rule, and the rule which is best supported by authority; and that, where no special rate is reserved, there is no distinction which can justly affect the rate to be recovered, between interest recoverable as interest and interest recoverable as damages.

*The exception is overruled.*



## BENTLEY v. HARRIS.

(10 R. I. 434.)

*Partnership — recovering part profits.*

A person who is to receive a part of the profits of a business, either in whole or part pay for his services, may maintain a bill in equity for an account of these profits.

*Hazard v. Hazard*, 1 Story, 371, stated and distinguished.

**BILL IN EQUITY.** The bill in substance charged that the defendant made a contract with the plaintiff, under which he was liable to account for and pay over to the plaintiff five per cent of the profits of mills Nos. 2, 3, and 4, in Woonsocket, belonging to the defendant, yearly and at the close of each year from and after January 1, 1864; that the plaintiff was under said contract in no way liable for losses in said business; that large profits had accrued under said contract; that defendant had never accounted for or paid over any portion of such profits; that the plaintiff was wrongfully discharged from his employment as superintendent of said mills in May, 1870; that the defendant had promised to cancel one of the three mortgages recited in the bill, and procured one of them by violence and fraud. The bill prayed for an account, for payment of two mortgages out of profits alleged to be due the plaintiff, for cancellation of the third mortgage, for injunction against sales under said mortgages, and for general relief.

The answer denied the allegations of the bill, and set forth a contract determinable at the will of either party, by which the plaintiff was to receive five per cent of the profits of said business over its losses, from and after January 1, 1865, until the termination of said contract, and averred that there were no profits.

The case was formerly heard at the March term, 1871, of the Supreme Court for this county, when, after consideration, it was ordered that a decree be entered dismissing the bill, whereupon the complainant moved for a rehearing, and the case was again heard upon his motion at the present term.

*C. P. Robinson*, for complainant.

*Bradley & Metcalf*, for respondent.

POTTER, J. At the former hearing of this case upon the evidence, both parties seemed to confine themselves very much to an endeavor to show that there had or had not been profits made. On the motion for rehearing which we are now to determine, it is insisted by the complainant that he has a right to an account in order to ascertain whether there were any profits or not.

The bill alleges an agreement on the part of Harris to pay the complainant a certain salary as superintendent of his mill, and also a percentage of the profits of the business. This is admitted by the answer.

Is a person who is to receive a part of the profits of the business in whole or part pay for his services entitled to an account of those profits? We have been referred by complainant's counsel to no cases where the point has been decided, and therefore must determine the question according to reason and analogy.

The case of *Hazard v. Hazard*, 1 Story, 371, cited by Mr. Bradley for the defendant, is not in point. In that case the defendant was to receive part of the profits as his pay, and as the business turned out a losing one, the employer filed a bill in the United States Circuit Court to have him held as a partner and made liable for a portion of the losses. Judge STORY only decided, after a very full examination, that receiving part of the profits as compensation for services did not constitute him a partner as between themselves.

Most of the cases we have examined have turned upon the question, what participation in profits made the participant liable as partner. There may be cases where a person puts his services into a business as a set-off against capital furnished by another, and in such a case if he is a principal and has a control, a right to manage the business, an interest in the profits as profits, he would, according to the cases, be held entitled to an account as a partner.

In the present case the complainant has an interest in the profits, not as profits, but as wages;\* he has no agency or control, but is in all respects the servant of his employer. It is a mere debt from employer to employee, and for which the complainant would have no preference as a partner would over any other debt due from said Harris on his individual account. There are a few cases where the

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\* Lord ELDON, *In re Harper*, 17 Ves. 404, 412, made light of this distinction, but it is held to be a sound distinction by Ch. WALWORTH, in *Champion v. Bostwick*, 18 Wend. 175, 185.

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language of the court would seem to imply that a person who receives part of the profits as pay is not entitled to account, unless connected with other things which would make him a partner. *Denney v. Cabot*, 6 Metc. 82-92; *Champion v. Bostwick*, 18 Wend. 175, 184; *Ex parte Harper*, 17 Ves. 404-412; 1 Story on Part., §§ 48, 49. But these expressions were only incidental and not necessary to the decision of the main question in those cases, whether the defendant was to be held as a partner. See, also, 3 Kent's Com. 25, notes.

But there seems to be sound sense in the remarks of Bissett (on Part. 12-15, quoted in Collyer on Part., § 45, note, p. 42, 4th Am. ed.): "Some of the writers, and even some of the judicial authorities on this subject, appear to think that they have surmounted the difficulty by confining the rule of liability (as a partner) to the cases where the party would have a right to an account of the profits; but to this it may be answered, that in all cases where a person is to be paid for his services by a sum *proportionate* to the profits, he must be entitled to an account of the profits. If not, how is he to ascertain that he has what he stipulated for. See 7 Jarman Conv. by Sweet, 11, note *a*. In many of the cases it will be seen that, notwithstanding a clear right to an account, no partnership was held to subsist either as between the parties or as to third persons."

And in *Hargrave v. Conroy*, 4 C. E. Green, 280-284, which was a suit by a party who had agreed to work for a fixed sum, with a part of profits in addition, the court, while holding that, according to the complainant's own statement of the profits (which for the argument was assumed as true), he had been overpaid, recognized his right to an account if the case had required it.

It is common for seamen, in certain sorts of voyages, to agree for a certain share of profits as wages, and an account is always taken when it is necessary to ascertain the amount of profits.

And, on further examination, we find that in the case of *Harrington v. Churchward*, where the salary was to be in proportion to profits, it was held by Vice-Chancellor WOOD, that the complainant might come into equity, not merely for discovery in aid of a suit at law, but to have an account. This case is in 3 Weekly Reporter. 202; 6 Jurist (N. S.), 576; 29 L. J. Chanc. 521, but does not seem to be in the regular reports. It is cited by REDFIELD, in note to Story's Eq. Jur. (8th ed.), § 451.

We think the complainant entitled to an account. The bill will

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therefore stand dismissed as to all charges of fraud (of which there is not the slightest evidence), with costs for the defendant up to the time of rendering the decree, and upon payment of costs, and giving security for future costs, if demanded, the complainant may proceed to have an account.

In regard to the motion by defendant's counsel for repayment of the moneys now in the registry of the court, as the defendant's estate is amply able to repay it, if found due, and it will be for the advantage of both parties to have it earning more interest, it will be granted.

*Decree accordingly.*

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FOSTER V. WILCOX.

(10 R. I. 442.)

*Covenant—action of, against married women.*

Where a wife joins with her husband in a lease of her lands, with covenants of quiet enjoyment, her heirs and devisees are not answerable after her death (as she would not be while living, being a married woman, and therefore not bound by such covenants) for any breach thereof.

ACTION of covenant to recover damages for a breach of covenant of quiet enjoyment given by the defendants' ancestor. The facts of the case and the defenses to the action relied on by the defendants are stated in the opinion of the court.

*Hart*, for plaintiff.

*Browne*, for defendant.

DURFEE, J. This is an action to recover damages for the breach of a covenant of quiet enjoyment contained in a lease to the plaintiff, executed May 26, 1840, by Horace A. Wilcox and Sally B. Wilcox, his wife. The plaintiff was evicted from a portion of the demised premises by the holders of the rightful title, in August, 1861, during the continuance of the lease, and in the life-time of the lessors. The action is prosecuted against the defendants as the heirs at law and devisees of the said Sally B. Wilcox. The case is tried to the court, trial by jury having been waived.

The first question presented is whether the action can be maintained — the objection to its maintenance being that the covenant of a married woman does not bind her, and consequently cannot bind her heirs or devisees. The plaintiff's counsel admits that the action would not lie against Sally B. Wilcox if she were alive, but contends nevertheless that the covenant is not so wholly void that an action cannot be maintained for a breach thereof against her heirs and devisees. The argument seems to imply or assume that the obstacle to the enforcement of the contracts of a married woman is not her inability to contract, but her immunity from suit. If this were so, however, her exemption would continue only during her coverture. Her exemption is much more absolute. The strongest cases against her subject her to liability only in case of a new provision made after she has become discoverd (*Lee v. Muggeridge*, 5 Taunt. 35; *Franklin v. Beatty*, 27 Miss. 347), while a still more authoritative current of decision is to the effect that her contract made during coverture is not affirmable even by a new provision after she becomes discoverd, without a consideration (*Lloyd v. Lee*, 1 Str. 94; *Meyer v. Howarth*, 8 Ad. & El. 467; *Wennall v. Adney*, 3 B. & P. 247, note; *Watkins v. Halstead*, 2 Sandf. 311; *Littlefield v. Shee*, 2 B. & Ad. 811), unless at least the consideration of the original contract was a benefit personally received by her. *Goulding v. Davidson*, 26 N. Y. 604.

The plaintiff's counsel refers to cases which hold that a widow is bound by the covenants contained in a lease of her lands, executed by her and her husband during his life, but not in a way to bind her, in case she accepts the rent after his death. See *Wotton v. Hale*, 3 Saund. (Wms. ed.) 180. But these cases, in so far as they are authoritative, do not appear to hold that the covenants have any validity against her, previous to her acceptance of the rent, but only that by accepting the rent she affirms the lease and her covenants therein, and thus gives them validity. *Worthington's Lessee v. Young*, 6 Ohio, 313, 335. In the case at bar it is doubtful if an acceptance of the rent could be construed to have any such effect; for, aside from the covenants, the lease is valid without any affirmation. But if it be otherwise, there has been no acceptance of any rent, since the death of Horace A. Wilcox, for that portion of the demised premises from which the plaintiff has been evicted, and certainly if an affirmation is to be implied from an acceptance

of rent, it can be implied only to the extent to which the rent has been accepted.

The plaintiff's counsel refers to the cases of *Nash v. Spofford*, 10 Metc. 192; and *Hill's Lessee v. West*, 8 Ohio, 226, which hold that a covenant of warranty in the deed of a married woman is operative against her by way of estoppel. But the courts which allow the covenant this negative efficacy do not allow it any other effect. *Fowler v. Shearer*, 7 Mass. 14; *Colcord v. Swan*, id. 291; *Wadleigh v. Sutton*, 6 N. H. 17; and there are cases which hold that the covenant is not operative even by way of estoppel to transfer an after-acquired title. *Jackson v. Vanderheyden*, 17 Johns. 167; *Den v. Demarest*, 1 Zab. 525, 541. And see *Wight v. Shaw*, 5 Cush. 56, 66.

The counsel also makes the point that a covenant for quiet enjoyment runs with the land, and is implied if it be not expressed. Doubtless this is so where the lessor is under no disability. But we do not think a covenant can be implied as a matter of law against a person who is incapable of covenanting as a matter of fact. Nor do we see how a covenant can run with the land, when it is without efficacy as a covenant. And if it can, we do not see how that helps the plaintiff; for a covenant that runs with the land cannot run with the land after the covenantee has been evicted. In the case at bar the plaintiff, as covenantee, was evicted during the life of Sally B. Wilcox, and while she was still under coverture. The plaintiff is suing the defendants on account of that eviction, and in order to charge them with liability for it, he ought to show not only that they are the heirs or devisees of Sally B. Wilcox, but also that as such they may be held to answer for a breach of her covenant, committed while she was alive and under coverture, for which breach she herself could not be held, for the reason that the covenant was of no effect against her as a contract. The defendants cannot be so charged, upon any principle with which we are acquainted.

The plaintiff claims that the action, if not maintainable against the defendants as heirs or devisees of Sally B. Wilcox, may be maintained against them as the heirs or devisees of Horace H. Wilcox. The declaration, however, does not allege that they are his heirs or devisees. It does not even allege that he is dead. We think judgment must be given for the defendants for their costs.

*Ordered accordingly.*

## THORNTON V. GRANT.

(30 E. L. 477.)

*Navigable river — erection of wharf in — when will be enjoined.*

The erection of a wharf in tide-waters is not a nuisance, if the navigation is not injured by the erection.

A court of equity will not interpose by injunction to prevent the erection of a wharf in such waters, unless it appears that the party petitioning will be materially and substantially injured by such erection.

Defendants, being the owners of an estate upon a navigable river, were erecting a wharf against their estate, extending out into said river. At the suit of the complainants, who were the owners of the estate next below them on said river, a preliminary injunction had been issued restraining them from the completion of their wharf. Upon a motion to dissolve said injunction, *held*, the evidence showing that the injury to the complainants caused by the completion of said wharf would be slight and contingent, and that, on the other hand, the wharf would greatly promote the defendants' trade and business, that the injunction could not be maintained, except so far as to prevent the respondents from so constructing the wharf as to spread its materials into the water in front of the plaintiffs' estate.

BILL IN EQUITY. The facts of the case, which came before the court on the respondents' motion to dissolve a preliminary injunction previously granted, are stated in the opinion of the court.

*James Tillinghast*, for complainants.

*Browne*, for respondents.

DUFFEE, J. This case comes before us on a motion of the defendants to dissolve a preliminary injunction, restraining them from the further erection of a wharf, already partly built, in Seekonk river, against their estate, which is situated on the west bank of said river, in the village of Pawtucket. The plaintiffs are the owners of the estate next below that of the defendants, and separated from it by Spring street, so called. They are extensively engaged in the coal and lumber business, and, for the convenience of their business, have erected on their estate wharves and other

expensive improvements. They insist upon a continuance of the injunction, upon the ground that the proposed wharf will be a public nuisance by reason of the obstruction which it will cause to the navigation of the river, the same being a tidal river, and will be especially injurious to them by incommoding the prosecution of their business, and by causing the river to shoal and fill up in front of their wharves, thereby destroying or greatly deteriorating their estate for the purposes to which it is adapted. The defendants, on the other hand, contend that the proposed wharf will not be a nuisance, and that it will not inflict any especial injury upon the plaintiffs— at least none which will be irreparable in its effect or incapable of pecuniary compensation. In support of these contradictory views a great deal of testimony has been submitted, consisting of affidavits, plats, a chart of the river, and the record of the lay-out of a highway extending into the waters which the defendants propose to occupy with their wharf. The general scope and purpose of this testimony we will briefly recapitulate.

The land constituting the estates of the plaintiffs and the defendants formerly belonged to one person, who sold to the defendants in 1857, and to the plaintiffs afterward. It lay on a bend or recess of the river, extending from Lamper Rock, so called, on the south-easterly part of the plaintiffs' estate, to a point opposite Seal Rock, so called, on the north-easterly part of the defendants' estate. After 1864 and 1865 both these estates were improved by the erection of wharves, and by filling out into the river; but in such a way that the flexure of the shore, though changed and lessened, was not destroyed. The estates were but a short distance below the head of navigation, and the river, in front of them, was narrow, with two channels which were ordinarily used for navigation, the one close to the east bank and the other in the center. Sailing craft of the larger kind usually navigated these channels by the aid of tug-boats, or by being warped or hauled in and out. The plaintiffs claim, and in support of their claim, submit affidavits to the effect that there was, in addition to these two channels, a third, which left the middle channel at Lamper Rock, and, winding along near the west shore, re-entered the middle channel a little above Seal Rock; that this third channel was navigable at all states of the tide, being from forty to a hundred feet wide, and from five to seven feet deep, at mean low water; that, up to the time when the proposed wharf was partly built, they were accustomed to use it with advantage in



the navigation of vessels engaged in their business, and especially for the purpose of egress from their wharves when there were several vessels at them; that the portion of the proposed wharf now built obstructs the channel, and even somewhat incommodes the accustomed use of their wharf adjacent thereto; and that the proposed wharf, if carried to completion, will entirely close the channel to the north of their estate, and, by changing the current and accumulating a large mass of dirt and gravel in the river near them, will inevitably tend to shoal the waters in front of their wharves.

The defendants admit that the river is navigable in front of the plaintiffs' wharves; but they claim, and in proof of their claim, they submit affidavits to the effect, that at and above Spring street, especially in the place of the proposed wharf, the river is much shallower, being only about three feet deep (and one witness says one foot deep) at ordinary low tide, except where the bottom is lowered by hollows and depressions; that the river was never used by the plaintiffs above Spring street for their vessels when loaded, and only very seldom when unloaded, their usual course being, after unloading their vessels at their wharves, to haul them out stern foremost, the way they came in; and that only two loaded vessels ever made the attempt to pass up the river along past Spring street, both being vessels of the defendants; one of which, favored by the tide, succeeded, and the other ran aground. The defendants also submit affidavits to the effect, that the plaintiffs themselves, at one time, entertained a plan of filling out in front of their estate, across the alleged channel; that they also proposed the establishment of a harbor line, and agreed with the defendants that the front of their proposed wharf would be a proper limit for the line; and that, in their conversations with the defendants about the proposed wharf, they did not object on the ground that it would obstruct navigation, but only on the ground that it would extend in front of their estate, and one of the plaintiffs assented to the filling provided it was not carried in front of their estate. The defendants also submit the record of the lay-out of a highway by the town council of North Providence, which upon appeal was confirmed by the Court of Common Pleas. By the record it appears that the highway so laid out (the same never has been opened) passes across the place of the proposed wharf, and in front of the wharf of the plaintiffs. The record also shows that under the rul-

ing given by the Court of Common Pleas, on the trial of the appeal, the jury could not have found in favor of the establishment of the highway, without also finding that the river where the highway was laid out was not of any practical use for the purposes of navigation. This highway was petitioned for by the owners of the estate now owned by the plaintiffs.

Besides the testimony above referred to, we have examined the chart copied from the United States coast survey. The chart conveys to us the impression that the river, at the place of the proposed wharf, is not so deep as the witnesses for the plaintiffs represent, and deeper than the witnesses for the defendants represent, being of a depth somewhere between — perhaps not far from half-way between — the two representations.

We think it is pretty clearly shown by the testimony that the river, at the place of the proposed wharf, is navigable to an extent which, under certain circumstances, might be valuable, but which, in view of the two channels ordinarily used for navigation, is of no practical value to any one except the plaintiffs and the defendants; that to the plaintiffs it is of no practical value for navigation by loaded vessels, and only occasionally, when their wharves are crowded, for unloaded vessels — the ordinary egress, for unloaded vessels even, being an egress backward past Lamper Rock.

The defendants contend that the erection of a wharf in tide-waters, where the injury is so inconsiderable, is not a public nuisance. At common law the fee of the soil in tide-waters below high-water mark is in the crown, and consequently, in England, every wharf that is built, and every rood of land that is filled in, by the riparian proprietor, without leave of the crown, is a trespass upon its right — technically termed a purpresture. But every purpresture is not a public nuisance; for the crown, while it may license a purpresture, cannot license a public nuisance. "It is not," says Lord HALE, "*ipso facto* a common nuisance, unless indeed it be a damage to the port and navigation;" and he adds, "whether it be a nuisance or not is *quæstio facti* and to be determined by a jury upon evidence, and not a *quæstio juris*." De Jure Maris, Harg. Tr. 85. The English cases, however, do not very clearly indicate the test or criterion which distinguishes a mere purpresture from a common nuisance. In *Rex v. Grosvenor et al.*, 2 Stark. 511 (decided in 1819), the defendants were indicted for a nuisance committed by the erection of a wharf between high and low-water mark, and extending

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for a considerable space along the river. Lord Chief Justice ABBOTT instructed the jury that the public had a right to all the convenience which the former state of the river afforded, unless by the change some greater degree of convenience was rendered. The place occupied by the wharf had previously been a recess where, there was evidence to show, vessels could find shelter in time of storm at certain states of the tide, and his lordship instructed the jury that, although vessels were not able to enjoy this benefit at all times, yet if they could derive benefit from it for the space of two hours each tide, they were entitled to that advantage, unless the want of it were compensated by some superior advantage resulting from the alteration. In *Rex v. Russell*, 6 B. & C. 566 (decided in 1827), the nuisance complained of was the erection of two staiths for loading ships with coals, one of which extended nearly 150 feet, and the other 130 feet from high-water mark into the river, and each of which extended a few feet beyond low-water mark. The jury were directed by Justice BAYLEY to acquit the defendants, if they thought the abridgment of the right of passage was for a public purpose and produced a public benefit, and if it was in a reasonable situation, and a reasonable space was left for the passage of vessels navigating the river; and he pointed out to them that the staiths were not merely a private benefit, for that by means of them the coals were brought to market at smaller expense and in a better condition, in both which respects the public were benefited. This direction, on review before the full bench, was approved, Justices HOLROYD and BAYLEY concurring, and Lord TENTERDEN, C. J., dissenting. The ground of Lord TENTERDEN's dissent was, that the benefit which the public might derive from the staiths, by getting their coals cheaper in price and better in quality, could not be set off by way of compensation for any injury resulting from the staiths to navigation. He said the proper question was whether the navigation was injured, and that, if the question had been left to the jury in that form, and a verdict had been found for the defendants, he did not see that any objection could have been properly made to it. Lord TENTERDEN and Chief Justice ABBOTT are the same person, and therefore, reading his charge in *Rex v. Grosvenor*, in the light of his dissenting opinion in *Rex v. Russell*, we may assume that he did not mean to say any thing more in his charge than that the wharf in question would be a nuisance if it materially injured navigation in any way, unless in some other way it benefited

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navigation to a greater extent. In *Rex v. Ward*, 4 A. & E. 92, the doctrine of compensation, as laid down in *Rex v. Russell*, was pointedly condemned, and has never since been recognized. See *Rex v. Morris*, 1 B. & Ad. 441; *Reg. v. Betts*, 16 Q. B. 1022. In *Rex v. Tyndall*, 6 A. & E. 143 (decided in 1837, and affirmed in 1854, in *Reg. v. Russell*, 3 Ellis & B. 942), it was held not to be a nuisance to erect piles and planking in a harbor if it was only in some extreme cases that the harbor was thereby rendered less secure. In *Reg. v. Randall*, 1 Carr. & M. 496 (tried at Nisi Prius in 1842), the defendant was indicted for erecting a wharf between high and low-water mark, where boats were used before to pass, and WIGHTMAN, J., left it to the jury to say, whether the wharf was an impediment to the navigation of the river by any description of vessels or boats, and told them not to consider the circumstance that a benefit had resulted therefrom to the general navigation of the river. In *Reg. v. Betts*, 16 Q. B. 1022 (1850), it was held that a bridge built partly in the bed of a navigable river is not necessarily a nuisance, the true question being whether a damage accrues to the navigation in the particular locality, which is a question for the jury.

The doctrine deducible from these cases is, that the erection of a wharf in tide-waters is not a nuisance, if the navigation is not injured by the erection. If, however, we inquire what is the degree of obstruction which, in contemplation of law, amounts to an injury to navigation, the cases do not furnish an entirely satisfactory answer. In some of the cases this question appears to have been left very much at large to the good sense of the jury; while in others, as in *Rex v. Grosvenor*, and in *Rex v. Randall*, language was used which would seem to imply that almost any inconvenience to navigation would constitute an indictable nuisance. And see *Folkes v. Chad*, 3 Doug. 340; *The Mayor of Colchester v. Brooke*, 7 Q. B. 339, 373; and *Gann v. The Free Fishers of Whitstable*, 11 H. L. Cas. 192.

The law as declared in the English cases has been recognized by the courts of this country, and has been applied in some cases with liberality toward the riparian proprietor. The earliest cases are *Commonwealth v. Pierce* (1790), and *Commonwealth v. Crowningshield* (1796), reported in 2 Dane's Abr. 696, 697. These were both Massachusetts cases, and in that State the local law, originating in a colonial ordinance, confers ownership of the shore between

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high and low-water marks, for one hundred rods, if the tide ebbs so far, upon the adjoining proprietor, subject to the qualification that he shall not have power to stop or hinder the passage of boats or other vessels. Both were cases of wharves; the wharf in the first case being built out to the channel, or near it; and in the second, being partly below low-water mark. In the first case, the court said that wharves are useful and necessary to trade, and might, under the colonial ordinance, and by the common practice of the country, be built out to low-water mark, or further, if not injurious to the public interest. Verdict for the defendant, because the navigation was left convenient. In the other case, the court say, "It is no obstruction to build out a wharf, if a sufficient passage or way is left for the public." In *Commonwealth v. Wright et al.*, 3 Am. Jur. 185 (1830), the defendants were indicted for erecting a wharf extending below the line of low-water mark and into the channel. THACHER, J., trying the case at Nisi Prius, directed a verdict against the defendant, unless the jury were satisfied that the benefit to navigation would exceed the injury. See also *Keen v. Sutton*, 5 Pick. 492; *State v. Wilson*, 42 Me. 9, 26. So also the right to wharf out, so long as the navigation is not impeded, or at least the fact that such a wharf is not a nuisance, has been recognized in Connecticut: *East Haven v. Hemmingway*, 7 Conn. 186; New York: *Wetmore v. The Atlantic White Lead Co.*, 37 Barb. 70, 96; and Florida: *Geiger v. Filor*, 8 Fla. 325. Likewise the rule has been recognized as applicable to our great inland rivers and lakes. *Bainbridge v. Sherlock*, 29 Ind. 364; *Dutton v. Strong*, 1 Black. 23. In New Jersey, by usage having the force of law, the riparian owner may, in the absence of restrictive legislation, reclaim the shore to low-water mark, and may hold it, when so reclaimed, as his own even against the State. *Gough v. Bell*, 2 Zab. 441; S. C., 3 id. 624; *Stevens v. Patterson & Newark R. R. Co.*, 34 N. J. 532. And it seems that the common understanding, in that State, carries the right even below low-water mark, provided there is no obstruction of navigation. See opinion of ELMER, J., 3 Zab. 658.

In this State we have no reported decision on the subject. Here as elsewhere, doubtless, the public right is paramount; but, at the same time, we know of nothing in the policy of the State, as evinced either by legislation or by prevalent usage, which would lead us to regard a wharf as a nuisance, merely because it occupies water which, but for such occupation, might sometimes be used for navi-

gation. The great end of navigation is commerce, and commerce cannot be carried on to advantage without convenient wharves. There are many wharves in the State which extend beyond low-water mark, and we have no reason to suppose that it would be a gain for navigation to reduce them within that limit. In deciding whether the proposed wharf is now, or will be, when completed, a nuisance, we ought to bear this in mind; as we should also bear in mind the character of the river and existing modes of navigation. Regarding the wharf in that way, can we say that it is or will be a nuisance? Can we say that it will abridge or obstruct the navigation, not in some strained or technical sense, but as practical men consider abridgment and obstruction? We are not prepared to say that it will; neither are we fully prepared to say that it will not. The question is eminently a question for the jury; and if the case were before us upon the prayer for a permanent injunction, and were not refused on other grounds, we should wait until the verdict of a jury could be obtained. But we are now to decide simply whether the plaintiffs make a case for a continuance of the injunction pending the litigation; for, considering the manner in which the injunction was obtained, we think it is for the plaintiffs to show cause for its continuance.

The question then is, ought the defendants to be restrained, even by preliminary injunction, from the completion of their wharf, for the reason that it will be a public nuisance, when upon the evidence it is so very doubtful if it will be such. If we were satisfied that the defendants could not proceed without exposing the plaintiffs to the danger of a great and irreparable mischief, we should answer the question in the affirmative, and should not hesitate to enjoin them until their right to proceed could be fairly adjudicated. But we are not so satisfied. The only use which the plaintiffs have for the waters, proposed to be occupied, is as a way of egress for their unloaded vessels. This use is infrequent; their practice being to take their vessels in and out the same way, except when their wharves are crowded. They doubtless could take them out the same way always, though sometimes an egress the other way is more convenient. Smith Grant, one of the defendants, testifies that he never saw more than three vessels passing out up the river from the wharves of the plaintiffs; George F. Newell, another defendant, that not more than two or three a year pass out in that way; and Richard M. Payne, who for two or three seasons has

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superintended dredging in the vicinity, testifies that he has observed that the vessels of the plaintiffs are hauled in and out the same way, and that he never saw one going out another way. When the plaintiffs first learned that the wharf was proposed, they objected to it simply on the ground that it would encroach upon the space in front of their estate; and one of them, when assured that it would not, said there would be no objection. If they had thought the water of any great value to them as a way of egress, they would hardly have failed then to have objected to its obstruction. The defendants say, moreover, that when their wharf is built and the river dredged as they intend, its navigability will be improved rather than injured, even for the plaintiffs. This, of course, may not be so, though it seems not unreasonable. Very evidently, therefore, the injury which the plaintiffs will sustain, by the interruption of their passage up the river, will not be a very serious injury; and we do not think that, for an injury so slight and so contingent, they are entitled to have the defendants restrained from improving their estate, in a manner which will so greatly promote their trade and business, upon the ground that the improvement, when made, will be a public nuisance, without better evidence to support the charge. *Irwin v Dixon*, 9 How. (U. S.) 10, 27; *Bigelow v. The Hartford Bridge Co.*, 14 Conn. 565; *Zabriskie v. Jersey City & Bergen Railroad Co.*, 2 Beas. (N. J.) 314; *Morris & Essex Railroad Co. v. Prudden*, 20 N. J. 530; *Laughlin v. The President, etc., of Lamasco City*, 6 Ind. 223; *Richards' Appeal*, 57 Penn. St. 105; *Attorney-General v. United Kingdom Electric Telegraph Co.*, 30 Beav. 287.

The plaintiffs claim that the wharf, if built, will change the current of the river, and that, in consequence thereof, the mud and sediment of the river will fill in and shoal the water in front of their estate. We do not think the evidence to support this claim is sufficient to warrant an injunction.

They also claim that the dirt and gravel, of which the wharf is constructed, being uninclosed by walls, spreads into the water in front of their estate and interferes with the accustomed use of their wharves. This, if the claim be correct, is an injury to which they ought not to be subjected; but the defendants, without being enjoined from completing their wharf, may be enjoined from so constructing it as to produce such a result.

We think, therefore, that the injunction should be dissolved, or

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should only be so far continued as to prevent the defendants from constructing their wharf in such a manner as will allow the materials of which it is constructed to spread into the water in front of the estate of the plaintiffs.

*Decree accordingly.*

POTTER, J., dissented.

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STAFFORD V. CITY OF PROVIDENCE.

(10 R. I. 567.)

*Damage—measure of—on taking of land by eminent domain.*

The water commissioners of the city of Providence determined to make a public improvement, to wit, a reservoir, and took certain land for that purpose, but none belonging to the present complainants. After the location of said improvement they decided to take more land, namely, that of the complainants now in question. *Held*, that the value of complainants' said land was to be estimated as it was at the time it was condemned, and not at the time of the location of the improvement.

PETITION for a determination of the value of the lands of the petitioners, taken by the water commissioners of the city of Providence, under the provisions of chapter 640 of the statutes. The petition alleged that the petitioners had not agreed with the city or with the water commissioners upon the price to be paid for their lands so taken, and prayed that the same might be determined as provided for by said chapter 640 of the statutes. In accordance with the statute, appraisers were appointed by the court, who made an award appraising the entire damages to the lands of the petitioners at \$12,000. Upon the coming in of the report both the petitioners and the city of Providence expressed their dissatisfaction therewith, and demanded a jury trial, which was had at the October term, 1872, of the Supreme Court for this county, before Mr. Justice DUFFEE and a jury, when, after a verdict rendered in favor of the petitioners for \$23,053.32, the city of Providence alleged exceptions and moved for a new trial. The substance of the exceptions is stated in the opinion of the court.

*Bradley & Parkhurst*, for defendant, in support of the motion.  
1. Land taken for public use should be appraised at its value, inde



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pendent of the effect upon it of the proposal to take it for such purposes, and also independent of the effect upon it caused by taking adjacent land for the same purpose. *Cooley's Const. Lim.* 565; *Giesy v. C. W. & Z. R. R. Co.*, 4 Ohio St. 308; *Pacific R. R. Co. v. Chrystal*, 25 Mo. 544; *Woodfolk v. Nashville R. R. Co.*, 2 Swan, 422; *Alabama & Florida R. R. Co. v. Burkett*, 42 Ala. 83; *Parks v. Boston*, 13 Pick. 198; *Henry v. Dubuque R. R. Co.*, 2 Iowa, 288; *Troy & Boston R. R. Co. v. Lee*, 13 Barb. 169; *Canandaigua & Niagara Falls R. R. Co. v. Payne*, 16 id. 273; *In re Furman Street*, 17 Wend. 649; *Richmond & Lexington R. R. Co. v. Rogers*, 1 Duvall, 135; *Somerville R. R. Co. v. Doughty*, 2 Zab. 495; *Isom v. Miss. Central R. R. Co.*, 36 Miss. 300; *Deaton v. County of Polk*, 9 Iowa, 596; *Israel v. Jewett*, 29 id. 476; *Sater v. Burlington & Mt. Pleasant Plankroad*, 1 id. 386; *Penn. R. R. Co. v. Heister*, 8 Penn. St. 443; *Weston v. Pittsburg R. R. Co.*, 39 id. 478; *Henricton v. Atlantic & G. W. R. R. Co.*, 51 id. 90; *Schuylkill Nav. Co. v. Thoburn*, 7 S. & R. 415; *Harvey v. Lackawanna & Bloomsburg R. R. Co.*, 11 id. 434; *Meacham v. Fitchburg R. R. Co.*, 4 Cush. 291; *Upton et al. v. South Reading Branch R. R. Co.*, 8 id. 600; *Dwight et al. v. County Commissioners of Hampden*, 11 201; *Batley, Ex'r, v. Holbrook*, 11 Gray, 212.

II. The evidence of Mr. Bailey, that he and others had appraised land at threefold the former price of same, because in his opinion and that of his co-appraisers the land had been thus enhanced in value in consequence of the location of a water reservoir, other than the one in question in the vicinity of the land so appraised, was inadmissible, because it was *res inter alios acta*, and would oblige parties to try another case in this, and because a single opinion expressed in a private appraisal, of the effect of some other reservoir upon some other land, is not evidence of the general effect of such locations, and because there was no pretense that Mr. Bailey was an expert upon such subjects.

The evidence was material in connection with the admitted fact that the effect of the location of such water-works upon the value of adjoining lands was allowed by the judge to be considered by the jury as a proper element in the assessment of damages, and was, from the nature of the case, the controlling element in the assessment of value; and still further, because the judge stated to the jury that such location enhanced such property, as stated by the

witness, threefold its former value. *Somerville R. R. Co. v. Doughty*, 2 Zab. 495.

*James Tillinghast*, for the plaintiff, *contra*. I. The testimony objected to in the exception allowed was entirely relevant and pertinent to the issue.

II. The affidavits do not show any exception taken in the matters there referred to. Those matters are not therefore now before the court for review. But if they were, the ruling complained of was entirely right and eminently just. This farm — the *whole* of which was taken — was not seized till seven months after the reservoir had been located, and nearly 15 months after the popular vote to take the supply of water from the Pawtuxet river; and all the cases agree that where the whole land is taken, the owner is entitled to its full fair market value *at the time it is taken*, whatever may have contributed to make up that value — even although derived in part from the fact that the particular improvement for which it is taken is contemplated. *A fortiori* where, as here, the improvement itself has for months preceded the seizure. *Dillon's Munic. Corp.*, §§ 487, 488; *Vanblaricum v. State*, 7 Blackf. 209; *Giesy v. C. W. & Z. Railroad Co.*, 4 Ohio, 308; *Whitman v. Boston & Maine R. R. Co.*, 7 Allen, 313; *Parks v. Boston*, 15 Pick. 208, 209; *Somerville & Eastern R. R. Co. v. Doughty*, 2 Zab. 503; *Meacham v. Fitchburg*, 4 Cush. 299.

POTTER, J. Two exceptions are taken in this case. First. That the evidence of Mr. Bailey that he and others, who had been appointed to divide an estate, had appraised certain land at three times its former value, because its value had been enhanced by the location of a reservoir in its neighborhood, was improperly admitted. The witness was not offered in this case as an expert to give an opinion, but merely to state a fact; and we think it was within the discretion of the judge to admit it.

The second and most important exception is, that the judge was requested to charge "that its fair market value in cash, at the time it was taken, must be paid to the owner; and the jury in assessing the amount have no right to consider or make use of the fact that it has been increased in value by the proposal or construction of the improvement," but he declined to charge in those words. The first part of the request was substantially charged by the court. We think the latter clause of the request objectionable from its ambi-

guity and want of precision. In the present case it is to be remarked that the contemplated improvement had been located and actually constructed, or nearly so, before this land was taken, and it seems to be assumed that this construction has added to the value of the property taken; and the question is, who is to have the benefit of this increase in value. Now if the request is to be considered as meaning that whether a part or the whole of a man's land is taken, the jury are not to consider at all any increased value from proposed improvement, but are to value it as if no such improvement had ever been suggested, then the proposition is too broad and unjust to the land-owner. The market value of land is made up of a great many items—its productiveness, its pleasantness, its nearness to markets, mills, or even a mill privilege not yet occupied, etc. The expectation or certainty to a reasonable intent that a highway or railroad will be called for by the public interest, and that from the physical conformation of the country it must follow a certain route, adds an appreciable value to the land along the probable route. To take an instance: the knowledge that the western trade must have a route to the Atlantic, that the city of Baltimore would contend for this trade, and that the only practicable route for a canal or railroad to bring that trade to Baltimore was by the way of the narrow pass at Harper's Ferry, would for years before such an improvement was made add an appreciable value to all the land near that pass, and would be taken into consideration by every one who bought and sold. This may be an extreme case, because there was only one possible route, but it is still a fair illustration of what takes place in a less degree in other localities. In purchasing land in our new States, the fact that, before long, a railroad must be made to accommodate the business of particular sections, is taken into consideration by everybody in purchasing.

Says Judge DILLON (Munic. Corp., § 487), the fair value of the property "includes, and justly so, the full value at the time it is taken, no matter what may have caused that value, and although it may have shared with other property in the benefits of the proposed improvement."

Most of the cases which discuss the subject of these benefits, or that increased in value which land taken shares in common with all the land around it, have related to the question whether any such benefit or increased value shared be set off against or deducted from the value of the land taken.

If the request to charge means only that the jury are not to undertake to speculate on the future, and to calculate the increase of business or value which might accrue to the land taken from the proposed improvement, then it would be unobjectionable; if on the other hand it means that the jury are to exclude all consideration of any increase of value, which owners may have rightfully expected from any agitated or future possible improvement, or from any improvement determined on, then it is objectionable, because it excludes one of those elements which enter into the estimate of value of land everywhere. The jury, while on the one hand they should not attempt to speculate on it, on the other hand should not attempt to fix a value irrespective of such proposed improvement. In other words, if the probability of the making of certain roads or certain improvements has entered into and made a part of the value, and which a purchaser would have paid for it, the jury should not undertake to calculate that portion of the value and exclude it.

Where a part of the land is taken, there is no difficulty as to the rule; and where the whole is taken, we think there ought to be none; but the remarks we have made may aid us in deciding the present case, the peculiarity of which is that a public improvement was determined on and a quantity of land taken, but no land belonging to the present complainants, and sometime afterward the commissioners of the water-works decided that it was necessary to take more land, viz., the land now in question. The question is, is the value to be estimated at the time of the location of the works, or at the time the land is condemned? Obviously the latter, otherwise this gross injustice would ensue: if the first location had increased the value of the land in the neighborhood, and the then owner sold for this increased value, and the land was subsequently condemned, the purchaser would lose the difference. Upon any principle of justice, the person whose land is taken, whether in whole or in part, should be no worse off than his neighbors whose land is not taken, otherwise he does not receive that just compensation the constitution provides for.

"The transaction (says Judge DILLON, § 487), is a compulsory purchase, the compulsion, however, coming from the public; and the amount to which the owner is entitled is not simply the value of the property at a forced sale, but such sum as the property is worth in the market, if persons desiring to purchase were found

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who were willing to pay its just and full value and no more." Same rule in *Somerville, etc., R. R. Co. v. Doughty*, 2 Zab. 495.

But, says counsel for the city, in effect, we have caused this increase in the value of this land, and we should be entitled to the benefit of it. A man who builds an expensive house on one of a number of city lots thereby adds to the marketable value of all the adjoining lots. But he does not do it at the request of the owners of those lots, or with any special view to benefit them. And if afterward he should desire to purchase one of those adjoining lots, he could with no justice claim any deduction for the increased value he had given to it. So here the city improvement has probably added to the value of all the neighboring land. It is a necessary consequence of the improvement. Why should the owner of the land now taken be deprived of the benefit which he has received from this increase of value, more than the owners of the other neighboring land? We must therefore conclude that in case of land taken subsequently to the erection of a railroad or improvement, from a person, none of whose land had been taken before, the rule must be the value at the time of taking, of whatever items it might be composed, the same which other persons would give for it in the market; and in no case are we to consider on the one hand the necessity of taking it, nor on the other any attachment to the land or unwillingness to sell, growing out of local or family associations.

*New trial denied.*

CASES  
IN THE  
SUPREME COURT  
OF  
WISCONSIN.

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GLEASON V. GOODRICH TRANSPORTATION COMPANY.

(32 Wis. 36.)

*Carrier of Passengers — liability for passenger's baggage — what is baggage.*

Plaintiff took passage on defendant's steamboat, and was assigned a state room. He asked for a key to the room, that he might place his baggage therein, and was informed that they gave no keys. He thereupon went to the room and deposited his hand baggage, informing the saloon boys of the fact, and asking if it would be safe. The baggage was stolen. There was a baggageman on the boat, whose duty it was to receive and check baggage, which plaintiff knew. *Held*, that the defendant was not liable for the baggage, but *semble* that he would have been had the state-room been locked.

A price-book used by a commercial traveler in his daily business, *held*, baggage within the rule of a carrier's liability.

ACTION to recover the value of baggage alleged to have been lost through defendant's negligence.

The plaintiff, a commercial traveler, took passage on defendant's boat, and asked for, and had assigned to him, a state-room. He asked for a key, and was informed that no keys were given out, whereupon he said he did not care, he only wanted a safe place to leave his bag while he went to get his trunk checked. He then went to his room and deposited his valise or hand-bag, and told

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the saloon boys that he had left it, and asked if it would be safe, and was told that it would be. He then went to check his trunk, and, on returning, found his bag gone. Notices were posted about the place that the defendant would not be responsible for baggage, unless delivered to the porter and checked, but plaintiff testified that he did not see the notice. Among the contents of the valise was a book, containing a price-list of goods, which plaintiff was engaged in selling. Verdict and judgment for plaintiff. Defendant appealed.

*Carpenter & Murphy, for appellant.*

*R. N. Austin, for respondent.*

DIXON, J. It is an undoubtedly well-settled general rule, that a carrier of passengers has the right to establish any reasonable regulation which he considers necessary to secure the safety of the baggage of his passengers; and if the passenger knows of the regulation and his baggage is lost through his neglect or refusal to comply with it, the carrier is not answerable. But in a well-considered opinion by DALY, first judge, in *Macklin v. New Jersey Steamboat Co.*, 7 Abb. Pr. (N. S.) 241, that learned judge expressed the view that a regulation forbidding a passenger upon a steamboat from taking his baggage with him into his state-room or private chamber, except at his own risk, is not a reasonable regulation, so far as it would apply to light baggage or hand satchels, containing articles required for present use in travel, and cannot exonerate the carrier from liability for the loss of such baggage when taken by the passenger to his room in disregard of the regulation. Upon this point the judge said: "When a passenger pays in addition for a separate or private room, or, as it is called, a state-room, in these boats, he does so to get greater and better accommodation, and for the privacy and security which it affords. If he has simply with him a valise — a small portable article coming under the denomination of light baggage, as it may be carried in the hand, and that from its limited size usually admits of little else than the clothing and toilet articles required for present use — he has the right, where such is the general character of its contents, to take it with him into the chamber provided for him, and where he is to pass the night; and having placed it there and locked the door the obliga-

tion is upon the carrier to see that his property is not purloined or stolen. Any regulation, the effect of which would be to prevent him from doing this, would be unreasonable. It is essential to the traveler's convenience and comfort, and the law would not descend into the particularity of insisting that he should open the valise, and, taking out of it exactly what was requisite for the night, lock it up, and then take it and deposit it in the baggage room for safe keeping." The views thus expressed are criticised in the case of *The R. E. Lee*, 2 Abb. U. S. Cir. and Dis. Ct. R. 49, but are sanctioned by the decisions of the same court in *Mudgett v. Bay State Steamboat Co.*, 1 Daly, 151, and *Gore v. Norwich & New York Trans. Co.*, 2 id. 254. It is to be observed of all the foregoing cases, however, that in each the state-room door was provided with a lock, of which the key was delivered to the passenger, who had it in his possession, leaving the door of the room locked when the same was broken and entered, and the articles stolen for which the carrier was held responsible.

And there are some decisions of recent date in the English courts respecting the liability of carriers by rail, which tend very strongly to sustain the rule of the Court of Common Pleas of the city of New York. *Le Contour v. L. & S. W. Railway Co.*, L. R., 1 Q. B. 54; *Talley v. Great Western Railway Co.*, L. R., 6 C. P. 44. Those decisions relate to the responsibility of railway companies for the loss of baggage, such as carpet bags, books, cloaks and other like things wanted by passengers upon their journey, and which, with the consent of the company, they are accustomed to carry in the carriage with them. With respect to such articles, so carried, it was said by COCKBURN, C. J., in the first named case, that he could not help thinking "we ought to require very special circumstances indeed, and circumstances leading irresistibly to the conclusion that the passenger takes such personal control and charge of his baggage as to altogether give up all hold upon the company, before we can say that the company, as common carriers, would not be liable in the event of the loss." All the other justices were of the same opinion. In the other case the court evinced a disposition to modify somewhat the stringency of the rule, yet holding the company liable where the negligence or inattention of the passenger did not contribute to the loss. It is very unlikely that the same rule would be applied to light baggage thus carried by railway travelers under ordinary circumstances in



this country ; but the decisions are valuable as illustrating the rigid doctrines of the common law upon the liability of carriers, when not exempted by some well-known usage, by statute, or by special agreement of the parties.

In the present case the plaintiff deposited his hand-bag or valise in an unlocked state-room, whence, with the articles contained in it, it was lost or stolen. The room was that assigned him by some officer of the boat, the clerk or steward, probably the latter, at the time he went on board, and when he purchased his ticket. He asked for a key to the room and was informed they gave no keys, to which, as he testifies, he replied he did not care for that—all he wanted was to place his baggage in any room where it could be safe while he went down to get his trunk of samples checked. He deposited the valise in the unlocked room, having first called the attention of two or three cabin or saloon boys to the fact, and asked their opinion if it would be safe, and received from them an affirmative answer. After an absence of about three quarters of an hour he returned to the room, and the valise was gone. Had the plaintiff been furnished with a key to the room, and had he left it locked with the valise in it, we should have little difficulty probably in adopting the rule of the cases first above referred to, and in holding the defendant answerable for the loss. In such case the deposit in the state-room would be regarded as a delivery to the carrier, and the reasons for holding him responsible seem quite clear and satisfactory.

But the distinguishing feature of the present case is, that the state-room door was provided with no lock, and the plaintiff knew it when he left the baggage there with the door in that condition. Was the deposit, under such circumstances, a delivery to the company as a common carrier, unless the same was made with the knowledge or consent of some officer of the boat or agent of the company authorized to give direction in the premises? Was it negligence for the plaintiff so to deposit it without the knowledge or consent of some such officer or agent?

The rule of law is, that, to charge a common carrier with the loss of property, it must be shown to have been delivered to him or to his agent for transportation, and if there be an established usage in the carrier's business, delivery, according to that usage, must be shown. Delivery, if made to a servant or agent of a carrier, must be to such an one as is instructed to receive goods, and not one

engaged in other duties ; and where an established mode of delivery is shown, that mode must be pursued. *Trowbridge v. Chapin*, 23 Conn. 595 ; *Ball v. New Jersey Steamboat Co.*, 1 Daly, 491 ; *Angell on Carriers*, § 146 *a*. The case discloses no custom of travelers to deposit their baggage in the manner the plaintiff did, nor usage of carriers by steamboat in general, or of the defendant in particular, to receive or accept delivery in that way. It does appear that there was a porter or checkman on the boat, whose duty it was to receive and check baggage, and that the plaintiff had knowledge of that fact. In the absence of proof of any general or special usage authorizing the deposit, and with no evidence of specific direction or assent on the part of the carrier, and no finding by the jury that he was guilty of negligence in not providing the state-room door with a suitable lock and key according to the custom of such carriers, and that such negligence caused the loss, we should say the carrier could not be held responsible in the action, and that the placing of the valise in the state-room under such circumstances would not constitute a delivery. The case as here presented is wanting in evidence upon all these points ; nor was there any instruction asked by either plaintiff or defendant calculated to bring them to the attention of the court at the trial. Neither was there any instruction asked or given touching the point of negligence on the part of the plaintiff contributing to the loss.

On the part of the plaintiff the two following instructions were asked and given, both of which, on the case made by the plaintiff, were, we think, erroneous:

“First. If the jury find that the plaintiff left his baggage in the possession of the defendant’s boat by the direction and with the knowledge and consent of those having charge of the boat, and that the same was lost or stolen, they must find for the plaintiff. Second. If the jury find that the plaintiff had taken his passage on the defendant’s boat and paid his fare, and, with the knowledge and consent of those having the boat in charge, left his baggage in a state-room assigned to him for his use as a passenger, it was a delivery thereof to the defendant, and they must find for the plaintiff.”

It appears very clearly from the cross-examination of the plaintiff (and his was the only testimony tending to show knowledge and consent on the part of those having the boat in charge), that the

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saloon or dining-room boys were the only persons in charge of the boat who had such knowledge, or who professed to give such consent. There was no proof of knowledge or consent on the part of any other person engaged in or about the boat. The reference in the instructions must, therefore, have been to the knowledge and consent of those boys, and the jury were told, if they so found, that their verdict must be for the plaintiff. This was clearly insufficient upon the rule above stated. The dining-room boys were not authorized to waive conditions, or accept delivery of baggage in that manner. Their knowledge and consent was not the knowledge and consent of the defendant, or of those having charge of the boat and authorized to represent and bind the defendant in that particular. There was no proof that either the clerk or steward of the boat had such knowledge, or that they gave such consent or any similar direction with respect to the baggage of the plaintiff.

But the more serious objection in point of law to the instructions is, that they failed entirely to notice and to submit as a question of fact to be found by the jury, that the plaintiff was guilty of no negligence in depositing and leaving his baggage in the manner testified to by him. It cannot be doubted that the evidence was such as fairly raised and presented this question, and that the jury should have been required to pass upon it. It may have been the fault of the defendant that no specific request to charge upon this point was made; but yet we think the instructions given at the request of the plaintiff were defective and improper in wholly omitting it. "All the books agree," says NELSON, C. J., in *Tower v. Railroad Co.*, 7 Hill, 48, "that if the negligence of the passenger conduces to the loss of the goods, the carrier is not responsible." And this rule of law is peculiarly applicable to cases where, at the request of the passenger or with the assent, express or implied, of the carrier, baggage or goods are placed so as to be partially under the supervision and control of the passenger himself. The implied condition in all such cases is, that the passenger shall take ordinary care of the goods; and if his negligence causes the loss, the carrier is not responsible. It was upon this ground that the carrier was excused in *Talley v. Great Western R'y Co.*, *supra*, where the court say: "There is, moreover, a general principle applicable to these as to all bailments, viz., that the bailor shall not be heard to complain of loss occasioned by his own fault, and the loss in this case was so occasioned, and without such fault would

not have taken place. In truth the expression 'contributory negligence' in such a case is inaccurate, if it imply any negligence on the part of the company, all the negligence having flowed from one source, viz., the conduct of the passenger, and the whole loss having been occasioned thereby."

It should at all events have been submitted to the jury to consider whether there was any want of ordinary care on the part of the plaintiff in leaving his baggage in the unlocked state-room; and if the jury had found that there was, then their verdict should have been for the defendant.

A question was made upon the trial as to the baggage not having been delivered according to the conditions of certain printed notices which it was alleged were posted up in various places in and about the boat. Upon this point the court charged the jury, that before they could return a verdict for the defendant because there was no delivery according to the conditions of the notices, they must be satisfied from the testimony that the terms of the notice were brought to the knowledge of the plaintiff, and that he *consented* to them. It is objected that this instruction was erroneous in requiring the consent of the plaintiff to the conditions, and, supposing the conditions to have been reasonable and such as the defendant had the right to impose, there can be little doubt, we think, of the error. The consent of the passenger to such conditions is not necessary. It is enough that he knows them, and, that fact being ascertained, compliance with them will be required by law.

No evidence appears to have been given showing that the plaintiff knew the contents of the notices, or was otherwise informed of the regulations of the defendant as to the delivery or receipt of baggage. In *Macklin v. New Jersey Steamboat Co.*, *supra*, it was held that the passenger is under no obligation whatever to read any notice that may be posted on a mast or in a room, or in any conspicuous place. The court said: "It is well settled that common carriers cannot affect or limit their responsibility by putting up notices; and, this being the case, it is not obligatory upon the passenger to read them. They may be employed by the carriers as a means of bringing to the passenger's knowledge any reasonable regulation; but it does not follow from this that it is obligatory upon him to read all such notices; for, if we were to hold that, we would have to hold that whether he read them or not, it being obligatory upon him to read them, he would be chargeable with a

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knowledge of their contents; and this is further than the law has ever gone."

Another question made in argument here is, whether the "price book" described by the plaintiff in his testimony is to be considered as part of his ordinary personal baggage, for the loss of which the defendant may be held liable as a common carrier. The book, which was in manuscript, contained the prices of the component parts of all Sheffield goods, in the sale of which the plaintiff was engaged, such as files, tools and cutlery, and the cost of the material and of the production of each part toward its completion. It was a book useful to the plaintiff in making sales of the goods in different parts of the country, which was the object of his journey. He used it in his business from time to time as occasion required, for the purpose of ascertaining and correcting values which he could not keep in his head.

It has always been found very difficult to define with accuracy what shall be deemed baggage within the rule of the carrier's liability. The definitions given by BRONSON, J., in *Hawkins v. Hoffman*, 6 Hill, 590, and by Judge STORY in his work on Bailments, § 499, have generally been recognized as correct. After alluding to the difficulties and several of the definitions which have been attempted, Chief Justice COCKBURN lays down the following rule in *Macrow v. Great Western Railway Co.*, L. R., 6 Q. B. 622. He says: "We hold the true rule to be, that whatever the passenger takes with him for his personal use or convenience according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities, or to the ultimate purpose, of the journey, must be considered as personal baggage. This would include, not only all articles of apparel, whether for use or ornament, but also the gun case or the fishing apparatus of the sportsman, the easel of the artist on a sketching tour, or the books of the student, and other articles of an analogous character, the use of which is personal to the traveler, and the taking of which has arisen from the fact of his journeying. On the other hand, the term 'ordinary luggage' being thus confined to that which is personal to the passenger and carried for his use or convenience, it follows that what is carried for the purposes of business, such as merchandise or the like, or for larger or ulterior purposes, such as articles of furniture or household goods, would not come within

the description of ordinary luggage, unless accepted as such by the carrier."

Aided by the foregoing definition, which is as full and accurate as any which has been or perhaps can be framed, it is still difficult in the present case, as it has been found to be in many others, to determine what properly, or whether the book in question, comes under the description of ordinary personal baggage. In *Phelps v. London, etc., Railway Co.*, 19 J. Scott, N. S. 115 E. C. L. 321, the question for the court was, whether an attorney, traveling as a passenger on a railway, was entitled to carry with him in his portmanteau, as ordinary luggage, the deeds and documents which were required as evidence on a trial which he was going to attend, and it was held that he was not. On the other hand, in *Hopkins v. Westcott*; 6 Blatchf. 64, it was held that manuscript books, the property of a student and necessary to the prosecution of his studies, are to be regarded as baggage. In that case SHIPMAN, J., says: "Now it may safely be said, that books constitute to some extent a part of the baggage of every intelligent traveler. Especially is this the case with scholars, students, and members of the learned professions. There is no reason why they should not be under the protection of the law, as against the negligence of carriers, as well as any other portions of their baggage. But it is said that no case can be shown where the carrier has been held liable for manuscripts. No such case has been cited, and, in my researches, I have found none. But I see no reason for adopting a rule by which they should be excluded, under all circumstances, from the list of articles termed 'baggage.' With a lawyer going to a distant place to attend court, with the author proceeding to his publisher's, with the lecturer traveling to the place where his engagement is to be fulfilled, manuscripts often form, though a small, yet an indispensable part of his baggage. They are carried, as such, in his trunk or portmanteau, among his other necessary effects. They are indispensable to the object of his journey; and as they are carried with his baggage, in accordance with custom, I see no reason why they should not be deemed as necessary a part of his baggage as his novel or his fishing tackle. In the present case the manuscript books lost are admitted to have been necessary articles for the student at the institution to which he was proceeding. They must, under all the circumstances, be deemed to have been a part of his baggage, for which the defendants are liable."

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 Ralph v. The Chicago & Northwestern Railway Co.
 

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In *Torpey v. Williams*, 3 Daly, 162, it was held that both money and jewelry form part of a passenger's baggage, for the loss of which a carrier is liable, provided the former does not exceed a sum necessary for traveling expenses, and the latter is confined to such as is ordinarily worn about the person.

It must on the whole be held, we think, that the book in question was an article of personal baggage within the definition above given and the decisions upon the subject. It was a thing of personal use and convenience to the plaintiff according to the wants of the particular class of travelers to which he belonged, and was taken with him as well with reference to the immediate necessities of his journey as to the ultimate purposes of it. It was not an article of merchandise or the like, or any thing designed for use ulterior the purposes of his journey, but a book of memoranda convenient and necessary for him personally in accomplishing the object of his travel. It was personal baggage, within the definition and rule of law upon that subject.

*Judgment reversed, and a venire de novo awarded.*

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 RALPH V. THE CHICAGO & NORTHWESTERN RAILWAY COMPANY.

(33 Wis. 177.)

*Parties — in action against carrier for loss of goods.*

The purchaser of a chattel, being dissatisfied with it, reshipped it to the seller, and, afterward, the chattel not having come to the seller's hands, paid him for it. *Held*, that the right of action against the carrier for its loss was in the purchaser.

ACTION to recover the value of a quantity of rope which plaintiff alleged he delivered to defendant for transportation to Chicago. Answer, general denial. The evidence tended to show that plaintiff ordered the rope in Chicago; that it was sent to him; that on receipt of it he was dissatisfied with it, and delivered it to defendant to be reshipped to the vendors at Chicago. The rope was lost, and plaintiff paid the vendors therefor. The evidence was conflicting as to whether the rope was delivered to the defendant, but the

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opinion on that point is of no general interest, so that the evidence need not be stated.

Judgment was rendered for defendant, and plaintiff appealed.

*L. B. Caswell*, for appellant.

*A. A. Jackson*, for respondent.

LYON, J. I. Even though it be conceded that the plaintiff was not the owner of the rope in question at the time of the alleged delivery thereof to the defendant, still we think that, under the circumstances of the case, when the plaintiff paid for the rope he became the owner thereof, and of the alleged cause of action for the loss of it. Had the action been brought by the vendors, the Chicago firm, after such payment was made, proof of the payment would doubtless defeat such action. If the plaintiff cannot recover in this action, then no person can recover for the loss of the rope.

[The remainder of the opinion is devoted to a consideration of the evidence.]

*Judgment reversed.*

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DRIVER V. THE WESTERN UNION RAILROAD COMPANY.

(22 Wis. 509.)

*Damages — in taking land for railroad.*

Plaintiff was notified by defendants that part of certain lands bought by him to erect buildings on would be taken by defendants for their rail road, and proceedings were commenced therefor; plaintiff notwithstanding erected his buildings and defendants afterward took the land. *Held*, that the damage for the taking of the land was to be estimated as of the day when the defendants acquired the right to the property, and that plaintiff was entitled to damages according to the value of the lands as improved. Several lots were used in connection with a mill property. One of the lots was taken for the use of a railroad. *Held*, that evidence that the business of the mill would be injured by the taking, was admissible on the question of damages.



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**APPEAL** from an award made by commissioners appointed under a statute to assess plaintiffs damages for the taking of their lands by defendants.

It appeared that the plaintiffs were the owners of several lots in the city of Racine, which they had purchased for the purpose of building a sash and door factory and planing mill; that in January, 1870, they were notified by defendants that one or more of the lots would be taken by them for railroad purposes; that in February notice of proceedings to take the land were served on plaintiffs; that notwithstanding plaintiffs went on and built their factory and planing mill and had it in operation about the 1st of May, 1870; that the defendants acquired title to one of the lots on May 7, 1870.

The Circuit Court instructed the jury substantially as follows: "It appears that the plaintiffs were the owners of lots 7, 8, 9 and 10, in block 5, in the first ward of this city, on the 7th of May last. Upon this appeal you are to re-appraise their damages upon the following principles: 1st. You are to allow them what would have been the fair market value of lot 7, on the 7th of May last, had there been no railroad track on the lot, or on the east half the street by which said lot was bounded on its west side (viz., that part of the street of which the fee was in the plaintiffs). 2d. If the market value of lots 8, 9 and 10 is permanently depreciated by reason of the taking and appropriation of lot 7 for railroad purposes, you will also allow plaintiffs the amount of such depreciation, estimated as of the 7th of May last, less any benefits which have accrued thereto by reason of the drain constructed by the railroad company. I do not recollect that there is any testimony tending to show any other special benefits resulting to plaintiffs by reason of the construction of the railroad, or by reason of any improvement made by the railroad company. Plaintiffs are not chargeable for any benefits so resulting to them or their property which are enjoyed by them in common with the rest of the community."

"Counsel for defendant has moved the court to strike out the evidence relating to the use to which the property has been put by its owners, and the effect upon such use of the taking of lot 7 for railroad purposes. This evidence was admitted upon the sole ground that it might have a bearing upon the question of the market value of the property before and after the condemnation of lot 7 for railroad purposes, and upon that ground, and that alone, I think the evidence was properly admitted. The use to which the

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owners have applied the property is of no importance beyond its influence upon the question of the market value thereof and such alleged depreciation."

"No damages to plaintiff's premises adjacent to lot 7 are to be considered, except such as directly result from the taking and appropriation of said lot, i. e., the depreciation in the market value of lots 8, 9 and 10 by reason of the taking of lot 7 — less the peculiar benefits thereto, already spoken of."

"If you find that the aggregate of such damages exceeds \$1,750, you may allow interest on such aggregate, at seven per cent, from the 7th of May last to the present time."

The court refused instructions asked by the defendant, which were in substance as follows: 1. That the fact that the land taken was to be used for railroad purposes, rather than for any other lawful purpose, was not to be considered in estimating the damages to the premises not taken. 2. That the jury were not to estimate damages to any part of the premises not taken except lot 8, which alone was immediately adjoining the lot taken. 3. That if, prior to the time when plaintiffs made their improvements and erected their structures on their premises not taken, they were notified by the railroad company that lot 7 was required for railroad purposes, and that, unless said company could otherwise acquire the right to said lot from the owners, proceedings would be taken to condemn the same for railroad purposes, and if plaintiffs, nevertheless, proceeded to make such improvements and erect such structures, they were not entitled to any damages to said adjacent premises on account of the taking of lot 7, except the depreciation in market value of said adjacent premises occasioned by the condemnation of that lot. 4. That the particular use to which plaintiffs had appropriated the premises not taken should not be considered in estimating the damages thereto.

Verdict in favor of the plaintiffs, for \$6,032.80 damages; new trial denied; and defendant appealed from a judgment on the verdict.

*Fuller & Dyer*, for appellant.

*John F. Fish* and *E. O Hand*, for respondent.

COLE, J. It is very clear to our minds that there was no error in the ruling of the court below in holding that the jury, in esti-

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making the damages, should consider the value of the premises as of the 7th day of May, 1870, the time of the taking and condemnation of lot seven for railroad purposes. This is the time the land was actually taken by the company under its charter, and when the commissioners appointed to appraise the damages made their award. The charter makes it the duty of the commissioners to view and examine the lands which are taken for the use of the road, with the buildings and improvements thereon, and to estimate the value of the lands so taken or required by the company, and all damages which the owner should or might sustain by reason of the taking of the same for the construction and use of the road, taking into consideration the advantages as well as the disadvantages of the same, by means of the construction of the road, to the owner of the property. Section 1, Ch. 16, P. & L. Laws of 1854. Upon the commissioners making and filing their report, and payment or legal tender of the appraisement to the owner, or upon the payment of the amount to the clerk of the court to which the appeal has been taken, title vests in the company. Now the 7th of May was the time the commissioners made and filed their award, and when the company, by depositing the amount thereof with the clerk, acquired, under the charter, the right to lot seven. This, then, was the actual taking of the property for the use of the road, and the time to fix its value, not only within the intent of the charter, but upon general principles applicable to these cases. *The Milwaukee & Miss. R. R. Co. v. Ebel*, 4 Chand. 72; *Robbins v. Milwaukee & Haricon R. R. Co.*, 6 Wis. 636; *Kennedy v. The Mil. & St. Paul R. R. Co.*, 22 id. 581. The plaintiffs were entitled to recover the value of lot seven at the time it was condemned and appropriated by the company, together with such damages as they sustained by reason of the taking of the same, over and above the advantages to them in consequence of the construction and operation of the road.

The counsel for the company would probably not contest the correctness of these views in ordinary cases, but he claims there are special circumstances surrounding this case which call for the application of a different rule.

It appears that the plaintiffs purchased lots seven, eight, nine and ten in block five in the first ward of the city of Racine, some time in January, 1870, and early in the next month proceeded to lay the foundation for a planing mill and a sash and door manufactory on lots eight, nine and ten, leaving a space of about 25 feet

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between the west side of the building and the west line of lot eight, and of 12 feet between the east wall of the building and the east line of lot ten. Upon this foundation a costly and extensive establishment was erected before the commissioners made their award, in May, of the value of lot seven, and the damages sustained by the plaintiffs to the adjacent property in consequence of the taking of this lot for railroad purposes. Long prior to the purchase by the plaintiffs, the railroad company had laid its track across the corner of lot seven with the consent of the owner, Charles Herrick, of whom the plaintiffs bought. It does not appear that the company had any thing more than a parol license thus to occupy the corner of this lot; or that Herrick had done any thing from which the company could justly infer that compensation for the property taken had been waived. But the plaintiffs had knowledge of the existence of the track there, and that the company was operating its road over it, when they purchased. And immediately after the plaintiffs' purchase, negotiations commenced between them and the officers of the company in respect to the acquisition and use by the company of lot seven for the purposes of the road, and the plaintiffs were notified that the company had been in possession of a part of that lot for more than ten years; that the entire lot was required for the use of its road; and that, unless it could be purchased at an agreed price, proceedings would at once be taken under the charter to condemn the whole lot. Proceedings were accordingly instituted, which resulted in an award on the 7th of May. But in the meantime the plaintiffs went on with their improvements, and, when the commissioners came to examine the premises, had their planing mill and manufactory in successful operation. And it is insisted by the counsel for the company that it is contrary to every just principle of law or equity to allow the plaintiffs, after notice of the purposes and rights of the company in respect to lot seven, to proceed with their improvements and thereby enhance the damages which the company must pay on account of the depreciation of the adjoining property when it came to condemn that lot. As one item of damages, the plaintiffs were permitted to recover the depreciation in the market value of the property adjacent to lot seven by reason of the taking of that lot by the company for the use of its road, and the time for estimating the amount of such depreciation was by various rulings of the court determined to be the 7th of May

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Were the plaintiffs entitled to have the damages assessed as of that day, or should they be assessed as of some other time?

The proposition seems to us perfectly incontestible, that the company acquired the title to lot seven when the commissioners made their award and the amount thereof was deposited with the clerk. That was the time the land was actually taken and condemned under the charter. If the company occupied a portion of the lot with its track before this time, such possession was merely permissive. It had really acquired no rights even in that lot by purchase or condemnation. True, it had laid its track over the corner of the lot with the knowledge of the owner ; that is, it was occupying the lot under a license. But we suppose it would have been competent for the owner at any time to revoke the license and resort to his legal remedies to obtain possession from the company. Probably a court of equity would not have interfered to enjoin the running of the cars over the track on the application of the owner, because he had acquiesced in the track being laid without insisting upon compensation being first made. But further than this we do not understand the owner had lost or waived any rights by the delay of the company to condemn the property. And if the company neglected to exercise the right of eminent domain and acquire the property, it certainly could not insist that the owner should not use or improve it until it actually condemned it under its charter. Nor were the owners bound to await the action of the company, but could make their improvements in view, of course, of the contingency that a portion of the property might be taken for railroad purposes. But upon what principle it can be said the owners had no right to improve their property and build their factory, even though the consequences might be to enhance the damages which the company would be compelled to pay when it finally condemned a portion of the land, we are at a loss to understand. There is no ground for saying that the plaintiffs proceeded in bad faith, and made an expensive improvement merely for the purpose of enhancing the damages which the company would have to pay. They improved their property as they had a perfect right to do, and when the company proceeded to condemn lot seven under its charter, the plaintiffs insisted that it should pay the damages to the adjoining premises resulting from the taking of this lot for railroad purposes. It seems to us that the claim is a just and proper one ; fully sustained by the spirit and language of the charter. For the charter

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requires the commissioners to estimate the value of the land taken or required by the company, and all damages which the owner shall sustain or may have sustained by reason of the taking of the same for the construction and use of the road, considering the advantages as well as the disadvantages which may result therefrom to the owner. And, in estimating the damages sustained by the plaintiffs, the jury were properly advised to consider the value of lot seven, and the depreciation in the market value of the adjoining property, if any, at the time when, by the act of the company, it made this lot its own for all the purposes for which it was entitled to hold it under its charter. This is in accordance with the previous decisions in this State above referred to, and is plainly what the charter contemplates; and we fail to discover any fact or circumstance surrounding this case which calls for the application of a different rule. Suppose the planing mill and manufactory had been in successful operation when the negotiations took place between the plaintiffs and the agents of the company in respect to the acquisition of lot seven, but had been burned down before that lot was actually taken and condemned under the charter. In that event the company would not probably insist that the damages for the taking and condemnation should be assessed at any other time than when the commissioners made their award. The company would then doubtless have said that this was the time as to which the question of damages should be determined, since that was the time it actually exercised its right of taking the property under its charter. And this action of the company, depriving the owner of his title and dominion over his property and appropriating it to the use of its road, really constitutes the "*taking*," within the sense and meaning of the charter, for which compensation must be made. The previous occupancy of a portion of lot seven for its track, even with the consent of the owner, did not, however, make the lot the property of the company, or prevent the owner from insisting upon his legal remedies to recover possession. The fact that the plaintiffs proceeded with their improvements after the company instituted steps to condemn lot seven, is relied upon to show that they ought not in justice and equity to recover for any depreciation in value of the adjoining premises in consequence of the taking of this lot. But what could the plaintiffs do? They desired to improve and use those lots for their factory. True, they knew that the company had instituted proceedings to condemn

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lot seven, but those proceedings were wholly under the control of the company. The company might abandon them at any time before the commissioners made their award. The only thing they could do was, either to await the action of the company, which might neglect, as it had for years, to condemn the property, or to go on and improve and use it in that way which seemed most for their interests. And when the company should take any portion of such property for the use of its road, they might well rely upon the constitution and the charter for securing them compensation for all damages thereby occasioned. It is said they went forward with their eyes open, and, if they are subjected to inconvenience for the want of suitable room for the prosecution of the business of their mill, it is their own fault. The answer to all this is, that the plaintiffs had the legal and moral right to use and improve their property, and if the necessities of the company for the use of lot seven were such that it could afford to pay them the damages resulting from its acquisition, then the company could acquire it by the proper proceedings. But we fail to see any ground for imputing to the plaintiffs any negligence or wrongful use of their own in what was done by them.

Another question arises upon the exceptions taken to the admission of evidence of the use to which lots eight, nine and ten were devoted; of the business carried on by the plaintiffs upon the premises, and the effect which the taking of lot seven had on this business done at the planing mill and door and sash factory. It is said by the counsel for the company, that this evidence was objectionable as tending to introduce an element of damages not proper to be considered in the assessment. The court instructed the jury that this evidence was admitted upon the ground that it might have a bearing upon the question of the market value of the property before and after the condemnation of lot seven for railroad purposes, and upon that ground alone, and that the use to which the plaintiffs had applied the property was of no importance beyond its influence upon the question of the market value thereof, and any depreciation which resulted from the taking of that lot. I have had some difficulty upon the point whether the evidence was admissible even for the purpose stated by the court below, but am inclined to the opinion that it was. "The kind and amount of business transacted upon the premises by the plaintiffs were proper elements for the consideration of the jury in estimating the damages

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done" to the property by the taking of lot seven. Such evidence doubtless tended to prove the actual effect of the taking of that lot upon the residue of the property. The test question was, the real market value of the property before and after the taking of lot seven by the company. This would determine the amount of damages which the plaintiff had sustained in the depreciation of the mill property in consequence of the taking of that lot. The question in principle is quite analogous to the one presented in *Snyder v. The Western Union R. R. Co.*, 25 Wis. 60. There witnesses stated what in their opinion was the depreciation in the market value of the farm in consequence of the railroad passing over it, together with some reasons and facts why it was diminished in value. These facts and reasons were given by the witnesses to account for the actual decrease in the market value of the farm. So here, the evidence admitted in respect to the business done at the planing mill and factory tended to prove that this property was less valuable than it would have been had not lot 7 been taken for railroad purposes. And it is manifest that the use of the property, the kind and amount of business done, and the facilities for transacting it, would inevitably and necessarily enter into the estimate of the value of the property. They were elements proper for the consideration of the jury in estimating damages sustained by the plaintiffs in consequence of the taking of lot 7 by the company. See *Boston & Worcester R. R. Co. v. Old Colony & Fall River R. R.*, 3 Allen, 142-146; also *Price v. The Milwaukee & St. Paul R. R. Co.*, 27 Wis. 98; *Bigelow v. The West Wisconsin R. R. Co.*, id. 478. Of course the plaintiffs were not seeking to recover for damage done to their business, but for an actual injury to their property. If the mill property was not worth as much in the market in consequence of lot 7 being taken by the company, then this decrease in value measured the loss the plaintiffs had sustained by reason of the taking of the same. In this view, and with the qualification with which this evidence was submitted to the jury, I cannot see how it could have misled the jury as to the basis of their appraisal. For the jury were distinctly instructed to ascertain from the evidence the permanent depreciation in the market value of lots 8, 9 and 10, if any, by reason of the taking and appropriation of lot 7 for railroad purposes, to be estimated as of the day the commissioners made their award, less any benefits which might result to the plaintiffs from the construction of the drain made by the company.



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Again, it is said that, as the company took the whole of lot 7, the alleged depreciation in value of the adjacent premises could not extend beyond lot 8. But this is a mistake. See *Welch v. The Milwaukee & St. Paul R. R. Co.*, 27 Wis. 108, where it is held that the owner is entitled to compensation for the injury to the whole property, and not merely for that to the separate lots over which the road was built. That decision in principle is applicable here.

These remarks sufficiently dispose of the exceptions, which are deemed worthy of special notice.

The judgment of the Circuit Court is affirmed.

*Judgment affirmed.*

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## LUCAS v. THE MILWAUKEE &amp; ST. PAUL RAILWAY COMPANY.

(38 Wis. 41.)

*Railroad passenger — injury to person riding on freight train.*

Plaintiff was injured while riding upon a car attached to defendant's freight train. It appeared that defendant permitted passengers to be carried upon some of its freight trains, but not upon this one; that plaintiff went aboard said train in good faith, supposing that it was authorized to carry passengers, and was not informed to the contrary until after said accident; that the train was not brought to the passenger platform, and that the ticket office was not open. *Held*, that the jury might find that plaintiff was a passenger and entitled to recover.

ACTION to recover for personal injuries. It appeared that on the evening of November 5, 1870, the plaintiff, a boy of eight years of age, went with his mother and others to the defendant's depot in Madison, desiring to go thence to McFarland. The following is a portion of the evidence of Conner Howard, one of the parties:

"I went into the passenger depot; the rest stood on the platform. I then went out to the west end of the eating house building, and met a man there. He was standing a few rods west of the eating house (about ten rods from the train); a train stood on the north side of the depot. It extended east and west of the depot. He was within ten rods of the caboose. He was east of the caboose, which was on the west end of the train. He stood at the west end of the

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depot platform, between the tracks; west of the baggage room. He was a small man, about my size; carried a railroad lantern lighted. He stood there; he had some tickets or something in his hand that he was looking over, the same as if he was taking down numbers. I asked him where the train was that was going to McFarland. He told me it stood on the second track from the depot, and stood a little ways up that way, and pointed toward it with his hand. I then went up to where the rest of them stood on the platform. We then all came back to where the caboose was. I met the same man as I was coming back, within a rod or a rod and a half of the caboose. I could then see it. I asked him how soon they would be going out. He said the caboose stood there, and to get on; that they were going to get out in a few minutes. When we came close to the caboose, another man got in ahead of us. I don't know who he was. He had a satchel, and got on ahead of us. He got on at the forward end of the caboose. I saw him get on, and he went into the caboose door. The door was open. I got on the platform then. I helped the child on, and stood him inside of me on the platform; I was on the steps. I helped him up and put him on the platform. I helped his mother on then. Before I hardly had time to let go her hand, the cars gave a sudden bump and pitched the boy off. I heard a scream behind me, and saw her down between the cars too. She made a drop after him. I then turned, took hold of her, and pulled her back. I then jumped off on the north side. The boy went off the platform between the rails. The train made a bump as if to couple, and back it went about the length of one car."

The "boy" mentioned was the plaintiff, and had his arm crushed by the accident. The concussion was caused by a backing of one portion of the train against the other for the purpose of coupling. The train was a through freight, and was not intended nor authorized to carry passengers. The way freight trains were allowed to do so and this regulation appeared on the time-tables of the company.

Conner Howard further testified on cross-examination as follows: "I believe the window in the ticket office was shut up when I went there the first time." (This was between eight and nine o'clock of the same evening.) "I didn't try to buy a ticket there, because I understood they didn't sell tickets for freight trains. This was a freight train. When I went down the second time, I went into the passenger depot. The ticket office was then shut. I didn't try

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then to buy a ticket, because there was no place to buy a ticket at. I understood then that they didn't sell tickets for freight trains. \* \* \* I knew that every freight train carried passengers—all I have ever seen. I saw one passenger going on to it." This was the person with the satchel spoken of by Howard in his direct examination; and the conductor testified that he collected twenty-five cents fare of him, and expended it for beer for the train hands. There was evidence that on two occasions one or more passengers had been carried on this train, and paid fare to the conductor. The station agent testified that "the ticket office windows are only opened for a half hour before passenger trains leave."

The jury viewed the ground where the accident happened and where the train stood, and also the caboose in question, which was placed at the point where it stood when the plaintiff was injured. The instructions given to the jury by the court, and the proposed instructions which were refused, are sufficiently stated in the opinion.

Verdict for the plaintiff; and from a judgment duly entered thereon the defendant appealed.

*John W. Cary*, for appellant.

*Orton, Keyes & Chynoweth*, for respondent.

LYON, J. If the relation of carrier and passenger existed between these parties at the time the plaintiff was injured, the instructions which the learned circuit judge gave the jury on the subject of negligence are applicable to the case, and doubtless state the law correctly. At least they contain nothing of which the defendant can justly complain. The substance of all the instructions on this subject is to the effect that both the plaintiff, or those having the charge of him, and the employees of the defendant in charge of the train, were under a legal obligation to use ordinary care to avoid the accident; that ordinary care is that degree of caution which persons of ordinary prudence would exercise under like circumstances; that if the plaintiff, or those having charge of him, failed to exercise that degree of care, and if such failure contributed to the injury received by the plaintiff, he could not recover in the action, even though the negligence of the employees of the defendant also contributed thereto; but that if the injury to the plaintiff

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was caused by the want of such ordinary care on the part of the employees of the defendant, the plaintiff and those having charge of him being free from negligence, then, if the plaintiff occupied toward the defendant the relation of a passenger, he was entitled to recover. The foregoing is believed to be a fair statement of the substance of the instructions to the jury on the subject of negligence, and it is not deemed necessary to set out the same at length.

There was sufficient testimony on the trial tending to show that the injury was caused by the negligence of the employees of the defendant in charge of the train, to make such instructions applicable to the case; and there was not sufficient evidence to justify the court in holding, as a proposition of law, that the persons who had the charge of the plaintiff were guilty of negligence which contributed to the injury. The verdict necessarily negatived the existence of contributory negligence on the part of the plaintiff or those in charge of him, and affirmed that the injury was solely the result of the negligence of the employees of the defendant. Such are the inevitable presumptions or inferences which, in view of the testimony and the charge of the court, must be deduced from the verdict for the plaintiff. It is not claimed that the plaintiff can recover unless the relation of passenger and carrier existed. The controlling question in the case, therefore, is, whether the plaintiff, at the time he was injured, was lawfully a passenger on the train of the defendant; or rather, does the testimony tend to prove that the plaintiff was lawfully on the platform of the caboose as a passenger on defendant's train at the time he was thrown off and injured?

Upon this question the Circuit Court refused to give the following instructions proposed by counsel for the defendant:

"1. To constitute the relation of a passenger of the defendant, it being conceded that there was no express contract and no ticket bought, the train in question must be proved to be a passenger train used for the carrying of passengers.

"2. If the train in question was not such passenger train, but merely a freight train, and the regulations of defendant were that passengers were not allowed to be carried in such trains, then the plaintiff had no right to enter upon the train, and defendant cannot be made responsible, unless the employees in charge of the train knew of his presence and were guilty of negligence in view of such knowledge. And if the employees in charge of the train had no

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knowledge of plaintiff's presence on the caboose, or reason to believe he was there, and coupled the train in the usual manner, the plaintiff cannot recover.

"3. If the employees of the defendant were prohibited from carrying passengers on the train, then defendant cannot be held liable in this case unless the plaintiff has shown that some person, having authority so to do, authorized plaintiff to enter upon the train.

"4. The occasional carrying of passengers upon a freight train proved on the part of the plaintiff in case to have occurred but twice, does not make it a passenger train and authorize passengers to enter upon it, if the regulations of the company prohibited it.

"5. If this train was a freight train, without any passenger car attached, and the regulations of the company prohibited the taking of passengers thereon, then the acts of the conductor, in some few instances, in taking fare of and carrying passengers, would not authorize the plaintiff to attempt to enter the car as a passenger.

"6. If the train was not a train for the carriage of passengers, the defendant is not liable, unless the employees of the train were guilty of gross negligence in coupling the train.

"7. There is no proof in this case of the relation of passenger by the plaintiff to defendant, and hence he cannot recover."

The court gave to the jury the following instructions on the same subject:

"1. The plaintiff cannot recover as a passenger of defendant, without showing that he occupied that relation to the defendant.

"2. If you should find from the testimony that the night freight train in question was usually made up and started from the place where it stood when the party having charge of the plaintiff attempted to go on board, and that the defendant company, its agents or servants, had, previous to and about that time, carried such passengers in this night train, to and from Madison, as went aboard of their own accord, or upon application to some person having charge of the train, collecting from such person the usual fare of passengers, and further find that the caboose on the night in question, and at the time the party having charge of the plaintiff went aboard, was open for passengers, you will be warranted in finding a verdict for plaintiff, if you still further find the absence of negligence upon the part of said party in the care bestowed upon the boy, and the existence of negligence at the time upon the part of the employees of the defendant having charge of the train.

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And I will here add, that unless you do find the existence of the facts to which I have above alluded, I hardly see how, in view of the evidence, you are to find a verdict for the plaintiff, unless you find that they went aboard by direction of an employee of the defendant, having authority to give such direction, without negligence on their part.

"3. If, previous to and upon the night in question, this train had been and was carrying passengers and receiving fare, and you should believe from all the facts and circumstances that the party, in consequence of it, went there to take it, they were neither trespassers nor outlaws. And if they were conducting themselves in a prudent manner in attempting to get aboard the train, and the boy was injured in consequence of the want of ordinary skill and care upon the part of the employees of the defendant, the defendant is liable."

All of the instructions which the court refused to give are framed upon the hypothesis that, inasmuch as the proper officer of the railway company had ordered that no passenger should be carried on this particular train, therefore the employees of the company on such train could not possibly do any act or give any consent which would render the plaintiff a lawful passenger thereon, so as to entitle him to the rights and remedies of a passenger for the injury which he sustained, and that to entitle him to such rights and remedies it was absolutely necessary that he should have express permission from some officer of the company authorized to grant the same, to travel by that train.

Is this a correct hypothesis when applied to the facts of this case? In the consideration of this question there are certain undisputed facts which must be remembered. Among these are, 1st. A portion of the freight trains running on the defendant's railroad were authorized to carry passengers, and were for all legal purposes passenger trains. 2d. Howard, who was one of the persons who had charge of the plaintiff, supposed and believed that all freight trains on that road carried passengers. 3d. There is no evidence that Mrs. Lucas, plaintiff's mother, knew or believed to the contrary. 4th. It is not claimed that the plaintiff or any of the persons who were with him when he was injured had any knowledge that the train in question did not carry passengers, or that the conductor was prohibited from allowing passengers to ride thereon. It is very apparent from the evidence that none of the party suspected

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even that it was a train from which passengers were excluded by the rules and orders of the company.

Under these circumstances, is the plaintiff bound by the instruction to the conductor not to take passengers on the train, of which neither he nor those who had charge of him had any knowledge whatever? And because of such instruction was the plaintiff unlawfully on the platform of the caboose from which he was thrown by the sudden movement of the cars? It seems to me that the correct answer to these questions is perfectly plain and obvious.

Before the defendant used any portion of its freight trains as passenger trains also, and while the functions of the two were kept entirely separate and distinct, the one being used for the carriage of passengers and the other exclusively for the transportation of merchandise, a person riding upon a freight train, without express authority from some person competent to give it, would probably have been unlawfully on the train, and could not have successfully claimed and enforced the rights of a passenger against the defendant. But since the defendant has authorized the carriage of passengers upon some of its freight trains, it seems very clear to my mind that a different rule must be applied. I think that since the system of carrying passengers on freight trains was adopted by the defendant, a person who goes upon a freight train in good faith, supposing it to be also a train for carrying passengers, is entitled to all the rights and remedies of a passenger as against the company, at least until he is informed that he has mistaken the character of the train.

By making a portion of its freight trains lawful passenger trains, the defendant has, so far as the public is concerned, *apparently* given the conductors of all its freight trains authority to carry passengers; and if any such conductor has orders not to carry passengers on his train, they are or may be in the nature of secret instructions, limiting and restricting his apparent authority, and third persons are not bound by such instructions until informed thereof. This is a familiar principle of the law of agency, and no good reason is perceived why it may not be applicable here. There is testimony tending to show that a person about the train, and who appeared to exercise authority over it, directed the plaintiff and those with him to get on the train. It does not positively appear that this man was an employee of the defendant; yet so many

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facts and circumstances appear in the testimony, which tend to show that he was one of the employees on this train — perhaps the conductor who brought the train to Madison, that the jury would have been warranted in finding that he was such employee or conductor, had the question been submitted to them. Had the jury so found, and especially had they found that the person who gave the direction was one of the conductors of the train, then, upon the principle above stated, the defendant would have been bound by the direction, and the relation of the plaintiff as a passenger on the train would have been thereby established. This feature of the case was not distinctly presented to the jury in the instructions which were given, but is directly involved in some of the proposed instructions asked for on behalf of the defendant, and refused.

The law is, that the principal is liable to third persons “for the frauds, deceits, concealments, misrepresentations, torts, negligences, and other malfeasances and misfeances, and omissions of duty, of his agent, *in the course of his employment*, although the principal did not authorize, or justify, or participate in, or, indeed, know of such misconduct, or even if he forbade the acts, or disapproved of them. Story on Agency, § 452. And the learned author proceeds to give the reasons upon which the law is founded, as follows: “In all such cases the rule applies, *Respondeat superior*; and it is founded upon public policy and convenience; for in no other way could there be any safety to third persons in their dealings, either directly with the principal, or indirectly with him through the instrumentality of agents. In every such case the principal holds out his agent as competent and fit to be trusted; and thereby, in effect, he warrants his fidelity and good conduct in all matters within the scope of his agency.” The same rule applies to the relation of master and servant; and if the person committing the wrongful act was, at the time, in the relation of servant to his principal, he was acting *in the course of his employment*, and the principal is liable for the consequences of such act. *Philadelphia & Reading R. R. Co. v. Derby*, 14 How. (U. S.) 486.

The conductor of the train in question was the general agent of the defendant, for the purposes of operating that train. As between himself and his employer he had no authority to receive passengers upon it. Such want of authority, however, was not known to the plaintiff or those in charge of him. They knew that conductors of other freight trains were authorized to receive, and did receive,



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passengers on their trains; and believed, as they well might, that the conductor with whom they were about to take passage, had the same authority. Whatever the rule might be, were no freight trains of the defendant permitted to carry passengers, it must be held, under the circumstances of this case, that if such conductor directed the plaintiff to go on board of the train, and the plaintiff did so, he thereby became a passenger of the defendant, notwithstanding the conductor exceeded his authority. In other words, such direction, if given, was within the scope of the conductor's employment, and binding upon the defendant, although unauthorized.

The case of *Dunn v. The Grand Trunk R. R. Co.*, 58 Me. 187; S. C., 4 Am. Rep. 267, strongly illustrates and enforces some of the views above expressed. The company had given due notice that passengers would not be allowed to travel by freight trains on a specified portion of its line. Dunn entered the saloon car on a freight train on the prohibited part of the line. The testimony tends to show that the conductor informed him that he had no right to take passengers on his train, but on this point the testimony was conflicting. The report does not show conclusively whether Dunn was ignorant of the regulation or otherwise. The conductor received from Dunn the usual fare, and allowed him to remain on the train. During the trip Dunn was injured by the alleged negligence of the company or its employees, and brought the action to recover damages therefor. It was held that he was lawfully on the train, and that the company was liable for such injuries, the same as though Dunn had been on a regular passenger train of the company. The opinion by APPLETON, Ch. J., contains a very able discussion of the principles involved in the case, and references to many authorities bearing upon and illustrating those principles, and will repay a careful perusal. The case may also be found in 10 Am. Law Reg. (N. S.) 615.

Our attention has been specially called to a review of that case by Judge REDFIELD, and published with the case in 10 Am. Law Reg., p. 624, wherein the writer seems to dissent from the conclusion of the Supreme Court of Maine. This review has been read with the care and attention to which every production from the pen of that eminent jurist is entitled. The principle which Judge REDFIELD thinks has been violated by the decision of the Maine court is thus stated by him: "Every one is presumed to have notice that

railways do not carry passengers upon their ordinary freight trains, and that, if one is allowed to pass upon them as a passenger, it is conceded as a favor, and subject to the implied condition that he will incur the additional risk and inconvenience incident to that mode of transportation." This principle may be a correct one when applied to a case where the railway company does not permit passengers to travel on any of its freight trains; and it is very evident that the learned writer was only stating the principle as applicable to such a case. In the case which he was reviewing, the prohibition against carrying passengers on freight trains over the specified portion of the line was total—extending to *all* freight trains. In *Elkins v. Boston & Maine R. R. Co.*, 3 Foster, 275, which was an action for loss of goods shipped on a passenger train, it was held that the evidence failed to show that the railroad company had so conducted its business as to render itself liable as a common carrier of merchandise by its passenger trains; and in *Murch v. The Concord R. R. Co.*, 29 N. H. (9 Foster) 2, which was an action for injuries to the plaintiff, received by him when riding upon a freight train, it was held that the evidence failed to show that the company had so conducted its business as to render itself liable as a carrier of passengers on its freight trains. These are the only cases cited by Judge REDFIELD to sustain the principle above quoted; and it is fairly to be inferred from the language of the court that, had those companies habitually carried freight upon their passenger trains, or passengers upon their freight trains, a different rule would have been applicable. Indeed, Judge REDFIELD says in the same review: "If railway companies run passenger cars upon their freight trains, or *in any other mode* invite passengers to accept passage upon them, the company are bound to the same degree of responsibility as if they carried them in regular passenger trains." Where the fact exists that a railway company does habitually carry passengers upon very many of its regular and ordinary freight trains, and a person takes passage upon a freight train, believing it to be one on which passengers are carried, and he is not informed to the contrary, but, perhaps, is directed by the conductor to go upon the train, and there is nothing in the condition or situation of the train which shows that passengers are not carried upon it, as well as upon other trains of like character, in such a case I do not think Judge REDFIELD has said, or would say, that

"every one is presumed to have notice that railways do not carry passengers upon their ordinary freight trains."

Some stress is placed upon the facts that this particular train, upon which the plaintiff attempted to take passage, had no conveniences for carrying passengers; that it did not come to the passenger landing; and that the ticket office was not open for the sale of tickets to passengers during the usual time before the train left the station; and it seems to be claimed that these circumstances operated as a sort of notice that the same was not one of the defendant's freight trains upon which passengers might lawfully travel. The answer to this is, that neither the plaintiff nor the persons who had charge of him knew, at the time the plaintiff was hurt, whether the caboose had or had not conveniences for passengers. They had not then entered the caboose, and, in the darkness of the night and the hurry of getting on the train, it is fair to presume that they had no opportunity to examine its external appearance, conceding that its external appearance indicated that it was not adapted to the carrying of passengers. Further, it does not appear that the ticket office at the station was opened for those freight trains which received passengers, or that such trains came to the passenger platforms or landings, or that the external appearance of the caboose indicated that it was not adapted to the carrying of passengers. It appears affirmatively that the ticket office was opened only before the leaving of passenger trains, and that the same number of men were employed upon each freight train on the road, whether it was a train which carried passengers or one which did not. Considering these circumstances, and the further one that the plaintiff and the persons in charge of him were directed to go on board of the train by some person who, as they had good reason to believe, had authority over the train, there seems to be no foundation for the position that there was any thing in the appearance or location of the train, or in any of the surrounding circumstances, sufficient to charge the plaintiff and those with him, with notice that passengers were not carried on that train as well as on other freight trains of the defendant.

If the foregoing views are correct, it necessarily follows that all the proposed instructions are based upon an incorrect hypothesis, and hence that the court properly refused to give them to the jury.

Let us now briefly examine the instructions which were given to the jury. The doctrine of these is, that although the train in ques-

tion was not one of the freight trains on which passengers were carried, and although the conductors thereof had express orders from the defendant not to take passengers thereon, yet, if passengers were habitually, or perhaps occasionally, carried on such train without objection, and fare collected of them by the conductors, and if the caboose was open for passengers on the night that the plaintiff was injured, and the plaintiff and the party with him went upon the train because passengers had before been carried upon it, or because some employee of the defendant, having authority to do so, directed them to go upon the train, the relation of passenger and carrier existed between the parties.

No discussion of this doctrine is required here. It is quite sufficient to say that there is nothing in it, or in the instructions predicated upon it, of which the defendant can justly complain. Some portions of these instructions, considered without reference to the particular facts of the case, may be, and probably are, liable to criticism. For example, did the plaintiff's right to recover depend upon showing that the train upon which he was attempting to travel when injured was a passenger train, because passengers had previously been permitted to travel upon it, it would not be sufficient, I think, to show that the conductor permitted persons to ride on it on two or three occasions only; but the proof should show that the train carried passengers habitually or frequently, or its character as a lawful passenger train would not be established. But it is not perceived how this error (if it be one), or any other error in the instructions given (if any others have intervened), can possibly prejudice the defendant.

Had the court instructed the jury that if they found from the evidence that the persons in charge of the plaintiff believed, when they put the plaintiff on the train, that the same was one of the freight trains of the defendant which was authorized to carry passengers, and that they were not informed to the contrary before the plaintiff was injured, then the plaintiff was a passenger of the defendant, and entitled to the rights and remedies of a passenger, such instruction would have been unobjectionable, provided the views which I have expressed as to the law of the case are correct. Indeed, considering the undisputed facts in the case, it is very probable that the court might properly have instructed the jury, that at the time the plaintiff was injured the uncontroverted testimony proved that he was a passenger of the defendant. Either of

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the instructions here indicated would certainly have been less favorable to the defendant than those which were given. Hence there was no error in the instructions which the court gave the jury, which will work a reversal of the judgment.

Three exceptions to the rulings of the court, or objections to the admission of testimony, are claimed to be well taken. 1. The counsel for the defendant asked the conductor of the train in question, who was a witness, what were his orders relative to carrying passengers on that train. The court sustained an objection to the proposed testimony. This was error. The testimony was clearly admissible; for the trial might have developed a state of facts which would have rendered the testimony very important. Subsequently, however, Mr. Atkins, the superintendent of the defendant's railway, was permitted to testify that the conductor had orders not to take passengers on that train. This testimony was entirely undisputed, and the fact that such were the conductor's orders is a verity in the case. Of course the defendant cannot be injured because the conductor also was not allowed to testify to the same fact. 2. The court permitted Conner Howard to testify to certain conversations with the person supposed to be connected with the train, and who directed the party to get on board the train. I think this testimony was competent; and, had the exigencies of the case required it, the same was sufficient to justify the court in submitting it to the jury to find whether such person was an employee on the train. 3. It is said the court erred in permitting the witnesses Green and Miss Teed to testify that a short time before the plaintiff was injured, they traveled short distances on this train and paid fare to the conductor. This class of testimony was perhaps competent, as tending to prove that the train in question was a passenger train. The difficulty seems to be that there was not enough of it to establish the fact. But, if it was improperly admitted, it could not possibly have resulted in any injury to the defendant.

In any view which I have been able to take of the case, I am impelled to the conclusion that the judgment of the Circuit Court must be affirmed.

*Judgment affirmed.*

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(88 Wis. 121.)

*Criminal law — once in jeopardy — plea of, upon new trial.*

Defendant was indicted for murder, was convicted of murder in the second degree, and was afterward granted a new trial upon his own application. *Held*, that on the second trial he could not be convicted of a higher crime than murder in the second degree. (*See note, p. 751.*)

INDICTMENT for murder. The opinion states the case.

*Smith & Lamb*, for defendant.

*S. S. Barlow*, attorney-general, for the State.

COLE, J. This cause has been certified to this court by the circuit judge of Greene county, pursuant to section 8, chap. 180, R. S., for our decision or opinion upon certain questions of law which arose upon the trial. It appears from the report made by the circuit judge that the defendant was indicted for murder, and at the last October term of the Circuit Court for that county was found guilty of murder in the second degree. The verdict of the jury was set aside and a new trial granted on the application of the defendant, upon the ground and for the reason that there was no evidence given on the trial which warranted the jury in finding him guilty of murder in the second degree.

At the next term of court, when the cause was moved for trial, the defendant made a motion that there be a judgment of acquittal entered on the verdict rendered at the former term, for every offense of which he might originally have been convicted on the indictment, except the offense of which he was in fact convicted, namely, murder in the second degree; but this motion was denied, and the defendant was again tried, when the jury found him guilty of manslaughter in the third degree. Before the cause was finally submitted to the jury, the defendant, by his counsel, requested the court to give the following instructions:

"1. The defendant having once been tried for murder on the indictment, by the Circuit Court, and the jury having found him guilty of murder in the second degree, which was equivalent to an acquittal of murder in the first degree, and that verdict having been

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set aside by the court, you cannot now find him guilty of murder in the first degree.

"2. The defendant having once been tried on the indictment for murder, and having been convicted of murder in the second degree, he cannot now be convicted of murder in the first degree, or in any other degree except the second degree; nor can he be convicted on the indictment of any degree of manslaughter, or of any offense except murder in the second degree."

The court refused to give these instructions, and also refused to set aside the verdict, and has submitted for the opinion and decision of this court these questions:

"First: The defendant having once been tried on this indictment, and on such trial convicted of murder in the second degree, and such verdict having been set aside on the motion of the defendant, could he again be tried on such indictment for, or convicted of, murder in the first or third degree; and if either, which degree?"

"Second: The defendant having been tried and convicted of murder in the second degree, and the verdict having been set aside as above stated, could he again be tried on this indictment for, or be convicted of, any and what offense except murder in the second degree?"

"Third: Did the court err in refusing the application of the defendant to enter a judgment of acquittal as to all degrees of crime of which the defendant might have been originally convicted under the indictment, except that of murder in the second degree?"

In the case of *The State v. Martin*, 30 Wis. 216; S. C., 11 Am. Rep. 567, this court held, in accordance with what was deemed to be the great weight of judicial authority upon the subject, that where a defendant, upon an indictment for murder, was found guilty of manslaughter in the second degree, and a new trial was granted on his application, such new trial properly related to the grade of offense of which he had been convicted, and did not involve a judicial investigation as to whether he was or was not guilty of the higher crime of which he had been already acquitted by the verdict of a jury. The authorities in support of this view will be found in 1 Bishop's Criminal Law (4th ed.), § 849; Cooley's Constitutional Limitations, 328; *State v. Kittle*, 2 Tyler, 471; *Campbell v. State*, 9 Yerg. 334; *Esmon v. State*, 1 Swan, 14;

*Jordan v. State*, 22 Ga. 546, 557; *State v. Tweedy*, 11 Iowa, 352; *Morris v. State*, 8 Smedes & Marsh. 762; *Hurt v. State*, 25 Miss. 378; *Brenon v. The People*, 15 Ill. 511; *People v. Gilmore*, 4 Cal. 376; *Jones v. The State*, 13 Texas, 168; *State v. Ross*, 29 Mo. 32; *State v. Kattlemann*, 35 id. 105; *State v. Hill*, 30 Wis. 416, 422. The authorities in opposition to this view, and in support of the doctrine that the effect of granting a new trial on the application of the defendant is the same in a criminal as in a civil case, and opens the whole cause for retrial upon the same issues as on the first, are collected in the case of *The State v. Behimer*, 20 Ohio St. 572. It seemed to us, however, more in harmony with the humane maxims of the criminal law and the principles of the constitution, to hold that the finding of the jury acquitting the defendant of the higher offense was an adjudication upon that charge, and that legal effect should be given to it as such, while the new trial should be limited to the lower degree of homicide of which he had been convicted. But, in adopting that view, we did not intend to decide, nor do we think it is the necessary result of that rule of law, that upon the second trial the defendant cannot be convicted of a lesser degree of homicide than the one of which he had previously been found guilty.

In the case before us the only effect of setting aside the verdict finding the defendant guilty of murder in the second degree, would seem to be to leave that issue open for another trial, and also leave undetermined the further fact whether the defendant had committed any criminal homicide of a less degree than murder in the second degree. If the facts and circumstances attending the commission of the crime, as proven on the second trial, bring the offense within the statutory definition of murder in the third degree, or of any of the different grades of manslaughter, then we see no difficulty in giving full effect to the verdict. And this, perhaps, is all that need be said in answer to the first two questions submitted by the circuit judge. The defendant having once been tried for murder, and having by implication been acquitted of that offense by the verdict of the jury, he could not again be tried for that crime, but might be for the one of which he had been already convicted, or for any of the lesser degrees of criminal homicide, according to the circumstances of aggravation proven on the second trial. And if such circumstances reduced the grade of offense below that of murder in the second degree, we see nothing inconsistent or illogical in



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the rule of law which holds that he may be convicted of the lesser offense.

The third question submitted by the circuit judge, as to whether it was error to refuse the application of the defendant to enter a judgment of acquittal as to all degrees of crime upon which the defendant might originally have been convicted under the indictment, except that of murder in the second degree, we think must be answered in the negative. In addition to what has already been said, which has some bearing upon this question also, it may be further remarked that when the jury found the defendant guilty of murder in the second degree, they must have found all the facts and elements which make up the lesser degrees of homicide, with the aggravating circumstances which swelled the offense into the higher grade of crime; that is, in the language of the books, the higher crime necessarily includes the less, and finding the defendant guilty of manslaughter in the third degree, was finding him guilty only as to a part of the charge of which he had already been convicted. On the first trial the defendant was not only found guilty of manslaughter in the third degree, but also guilty of manslaughter under circumstances of aggravation, which enlarged the crime into murder in the second degree. There was but one count in the indictment, and when the defendant obtained a new trial, the issue substantially was, whether he was guilty of that crime as charged, or any lesser offense included in the principal charge. Nor can we perceive any ground for saying that this rule is a violation of the constitutional provision that "no person for the same offense shall be put twice in jeopardy of punishment," as argued by the learned counsel for the defendant.

It may be proper further to add, that the first instruction asked by the defendant, as set out in the report of the circuit judge, was correct as a proposition of law. But it appears that the jury found the defendant guilty of manslaughter in the third degree, and hence it is obvious that the refusal of the court to give that instruction could not possibly have worked any prejudice to him.

This cause must be certified back to the Circuit Court with this decision upon the questions submitted, and with directions to proceed and give judgment upon the verdict rendered.

*So ordered.*

NOTE. — See *State v. Martin*, 11 Am. Rep. 567, and *State v. McCorr* (8 Kans. 233), 12 Am. Rep. 469, and the note thereto. In the latter case it was held, under a statute providing that "the granting of a new trial places the parties in the same position as if no trial had been

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had," that a defendant who had been convicted of manslaughter on an information charging murder could be convicted of murder on a new trial granted on his own motion.

The case of *State v. Behimer*, 30 Ohio St. 573, cited in the principal case, contains a very elaborate examination of the authorities. The following is the opinion.

WHITZ, J. This case comes before the court on a bill of exceptions filed on behalf of the State under section 158 of the Criminal Code. 66 O. L. 310. Section 160 provides that the judgment of the court below shall not be reversed, nor in any manner affected; but the decision of this court shall determine the law to govern in any similar case which may be pending at the time the decision is rendered, or which may afterward arise.

The defendant was twice tried on an indictment charging him, in a single count, with murder in the first degree. The first trial resulted in a verdict finding him guilty of murder in the second degree; the second trial, in his conviction of manslaughter.

On his motion a new trial was granted in both instances. After the first new trial was granted, he interposed as a plea in bar of his further prosecution for murder in the first degree, the fact of his acquittal of that degree of homicide by the first verdict; and on demurrer by the State, the plea was held good, and the second trial was confined to murder in the second degree, of which he had been found guilty, and to manslaughter.

The question for decision, therefore, is, whether the legal effect of granting the new trial was to set aside the whole verdict, and leave the case for retrial upon the same issues on which it was first tried; or, whether the retrial was properly limited by the court to the degree of homicide of which the defendant had been found guilty, and to the inferior degree of manslaughter.

A new trial has been defined to be the re-investigation of the facts in a case; or rather, of legal rights of the parties upon disputed facts. The term "new trial," therefore, as applied to a jury case, has reference solely to an issue which has already been passed upon by a jury. 2 *Grah. & Wat. on New Trials*, 32.

In a civil case there would be no doubt where part of the issue has been found for the defendant, and he should obtain a new trial, that the whole issue would be re-opened for investigation on the second trial. And Mr. Wharton states, in his work on Criminal Law, that in this country the uniform and unquestioned practice, down to a comparatively late period, has been to extend to criminal cases, so far as the revision of verdicts is concerned, the same principles which have been established in civil actions. 2 *Am. Crim. Law*, § 8061. See also to the same effect, *Hartley v. The State*, 8 Ohio, \*403.

The ground relied on to withdraw criminal cases from the operation of the general rule is the provision in the bill of rights, which declares that no person shall "be twice put in jeopardy for the same offense."

Though the existence of the power was once doubted, it is now well settled that the court has the power, at the instance of the defendant, after a verdict of conviction, to grant a new trial, without infringing this provision of the constitution. 2 *Story's Com. on the Const. of the U. S.*, § 1787; 2 *Whart. Am. Crim. Law*, § 3060 *et seq.* The power has been uniformly exercised in this State, when, in the judgment of the court, a proper case arose.

The constitutional provision extends the common-law maxim, which was limited to felonies, to all grades of offenses; and it is but the application, to the administration of criminal justice, of a more general maxim of jurisprudence, that no one shall be twice vexed for one and the same cause. On this maxim rests the whole doctrine of *res judicata*. The object of incorporating it into the fundamental law was to render it, as respects criminal causes, inviolable by any department of the government.

In the case now before us, if, after the granting of the new trial, the finding of the jury acquitting the defendant of murder in the first degree stood as an adjudication of that fact, and had its full legal effect, it would preclude his retrial for any of the lower degrees of homicide.

Thus, "an acquittal on an indictment for murder will be a good plea to an indictment for manslaughter of the same person; and *converso* an acquittal on an indictment for manslaughter will be a bar to a prosecution for murder; for in the first instance, had the defendant been guilty, not of murder but of manslaughter, he would have been found guilty of the latter offense on that indictment; and in the second instance, since the defendant is not guilty of manslaughter, he cannot be guilty of manslaughter under circumstances of aggravation which enlarge it into murder." *Starkie's Crim. Pl.* 337; 12 *Rick.* 504; *Arch. Crim. Pl.* (old ed.) \*p. 68; *Ree v. Jennings*, *Russ. & Ry.* 393.

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But the effect of setting aside the verdict finding the defendant guilty was to leave at issue and undetermined the fact of the homicide; also the fact whether the defendant committed it, if one was committed. The legal presumption on his plea of not guilty was of his innocence; and the burden was on the State to prove every essential fact. The only effect, therefore, that could be given to so much of the verdict as acquitted the defendant of murder in the first degree, after the rest of it had been set aside, would be to regard it as finding the qualities of an act while the fact of the existence of the act was undetermined. This would be a verdict to the effect that, if the defendant committed the homicide, he did it without "deliberate and premeditated malice."

There can be no legal determination of the character of the malice of a defendant, in respect to a homicide which he is not found to have committed; or rather, of which, under his plea, he is, in law, presumed to be innocent.

The indictment was for a single homicide. The defendant could, therefore, only be guilty of one offense, and could be subject to but one punishment. The degrees of the offense differed only in the *quo animo* with which the act causing the homicide was committed. The question of fact was whether a criminal homicide had been committed, and, if so, whether the circumstances of aggravation were such as to raise it above the grade of manslaughter. If the finding as to the main fact be set aside, the finding as to the circumstances necessarily goes with it.

The same view is evinced by the crimes act, which defines the different degrees of criminal homicide. Section 39 provides that in all trials for murder the jury shall, if they find the prisoner guilty, ascertain in their verdict whether it be murder in the first or second degree, or manslaughter; and if the conviction be by confession in open court, the court shall proceed by the examination of witnesses to determine the degree of the crime. S. & C. Stat. 416.

It seems to us, therefore, that the necessary result of granting the defendant's motion for a new trial was to set aside the whole verdict; and this having been done at his own instance, it can neither operate as an acquittal, nor as a bar to the further prosecution of any part of the offense charged. *Stewart v. The State*, 15 Ohio St. 155.

The whole verdict being set aside in granting the new trial, we can discover no other ground on which to hold that the defendant was entitled to his discharge from so much of the indictment as charged him with murder in the first degree.

It is not the case of a discharge of the jury for an insufficient cause and without the defendant's consent. The jury were properly discharged on rendering the verdict. The new trial results necessarily from granting the defendant's own motion.

In *Hurley's Case*, 6 Ohio, 400, the indictment contained three counts. The first charged him with murder in the first degree; the second with murder in the second degree, and the third with manslaughter. The record showed that the jury returned into court and reported that they had agreed that the defendant was not guilty on the first count; but that they could not agree on the other counts. The defendant moved the court to enter on the journal the verdict of the jury as to the first count, which the court refused. The Supreme Court declared there was no error: that "a verdict in either a civil or a criminal case must be considered an entire thing;" that the finding "was in law no verdict, and the court did not err in rejecting it altogether."

If the verdict could not be received without a finding as to the minor grades of the offense, it is not perceived how it can stand and have effect after the finding as to these grades is set aside. And it is laid down as the general rule, that, "if a jury find only part of the issue, judgment cannot be entered on the verdict. It is void for the whole; and a *verdict de novo* will be awarded." 1 Grah. & Wat. on New Trials, 140; 2 id. 1590.

The principle contended for on behalf of the defendant would equally apply to the setting aside a verdict finding a defendant guilty of petit larceny where the indictment is for grand larceny. The effect of the principle would be, that while the fact as to the body of the offense would be open to investigation on the second trial, yet the circumstance as to the value of the property would be *res judicata*, and conclusively settled by the first verdict.

The cases referred to by the defendant's counsel, which hold that the party cannot, on the second trial, be again tried for the higher offense, do so on the ground that so much of the verdict as acquits the defendant of the higher grade of offense remains in full force.

But upon mature consideration we are of opinion that the verdict is severable only when

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there is a conviction or an acquittal on different counts for separate and distinct offenses, or where there are several defendants; but that where there is but one defendant, and, in fact, but one offense, the verdict is entire. *Leslie v. The State*, 18 Ohio St. 380; *Jarvis v. The State*, 19 Id. 583.

In the last two cases the offense was set forth in several counts; and on the last trial the defendants were found guilty on counts on which they had been acquitted on the first trial. *Leslie's* case was for murder; that of *Jarvis* for manslaughter. The new trials had been granted on the motions of the defendants, and it was held that the effect of granting the new trial was to set aside the findings upon all the counts; that it was the same homicide, only laid in different ways. See *Thompson's Case*, 2 East's P. C. 515. Also, *The State v. Commissioners*, 2 Hill (S. C.), 289; *The State v. Stanton*, 1 Ired. 494; *Morris v. The State*, 1 Blackf. 37.

Where there are several defendants there may be different trials; but if there is only one trial, though the verdict be joint or single in form, it is several in effect. *Rex v. Manobey*, 6 Term R. 686; *Starkie's Cr. Pl.* 687. In such case, if the jury agree as to some of the defendants, their verdict may be received, though they cannot agree on the verdict as to others. 19 Mass. 318; 6 Serg. & R. 577.

Mr. Wharton, in noticing the cases which hold to the rule adopted in the court below, states that such ruling has not been the uniform understanding in practice; and he gives as a striking illustration of this the address of Mr. Justice Gamm, of the Supreme Court of the United States, to a party of prisoners who applied for a new trial after having been convicted of manslaughter in the Circuit Court of the United States in Philadelphia, and in which the law was laid down as now held by us. *United States v. Harding et al.*, 1 Wall. Jr. 147; 1 Whart. Am. Crim. Law, § 550.

In *Livingston's Case*, 14 Gratt. 593, the indictment was in the usual form of a common-law indictment for murder, and contained but one count. On the first trial the defendant was found guilty of murder in the second degree; but on his motion the verdict was set aside and a new trial granted. On the second trial the verdict was for manslaughter. On this trial the jury were charged in the same terms as on the first trial. In the Court of Appeals the judgment was reversed for errors in the ruling on the trial as to the admission of evidence. In the opinion of the court it is said: "As, however, on account of the errors in the ruling of the Circuit Court, which we have already indicated, we have to reverse the judgment and remand the cause for a new trial, the question does not necessarily arise, whether upon such trial the prisoner may yet be legally tried and convicted of murder in either degree; or whether the Circuit Court is to be directed so to modify the charge to the jury as to restrict their inquiry and finding to the offense of manslaughter."

DANIELS, J., after reviewing the case of *Slaughter v. The State*, 6 Humph. 410, and the cases in a number of other States which seem to have adopted the reasoning of that case, was of opinion that "the judgment should be reversed, so much of the verdict set aside as found the prisoner guilty of manslaughter, and the cause remanded for a new trial for manslaughter only." But as the other judges did not concur in this view, the order directed to be entered was "to reverse the judgment, set aside the verdict, and remand the cause for a new trial on the indictment, to be made on the indictment as it stands, and without any change in the usual charge to the jury."

I shall not undertake to examine in detail the cases in some of the other States opposed to the views we have taken. It is sufficient to say we find the grounds on which they rest unsatisfactory, and we are unwilling to adopt them as correct expositions of the law of this State.

In our opinion the court below erred in overruling the demurrer of the State to the plea of the defendant. But, as the judgment rendered by the court below cannot be affected by this opinion, we state the following as the rule of law, which, in our judgment, ought to govern this and like cases: Where, on a trial for murder, the defendant is found guilty of a lower degree of homicide than the highest degree charged in the indictment, and, on his motion, a new trial is granted, the effect of granting the new trial is to set aside the whole verdict and leave the case for retrial upon the same issues as on the first trial.

BOOTH, C. J., and WELCH, DAY and MOLLVARE, JJ., concurred.

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McLeod v. Bertschy.

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## MCLEOD V. BERTSCHY.

(33 Wis. 178.)

*Discontinuance of action after answer of counter-claim.*

Where the defendant in an action sets up a counter-claim in his answer, the court has no authority to grant plaintiff leave to discontinue the action, except as to his own claim or demand.

MOTION to dismiss appeal.

*Mariner, Smith & Ordway*, for appellant.

*Jenkins & Elliott*, for respondent.

LYON, J. This is a motion to dismiss an appeal from the order of the county court, denying leave to the plaintiff to discontinue the action, and is made on the alleged ground that such order is not appealable.

The cause was formerly here on an appeal from an order refusing to strike it from the calendar; and we then held that the plaintiff could not discontinue the whole action by entering an order of course to that effect, after the defendant had interposed a counter-claim, consisting of a substantive cause of action against the plaintiff. 32 Wis. 205.\* In the manuscript opinion on that appeal,

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\* The following is the opinion then delivered:

LYON, J. The following propositions must, we think, be conceded: 1st. At the common law, a plaintiff had the absolute right to discontinue his action before or after issue joined, and without leave of court. 2d. In suits in equity, under the former practice, the plaintiff might, in like manner, dismiss his bill, but such dismissal did not carry with it a cross-bill interposed by the defendant. 3 Barb. Ch. Pr. 128, and cases cited. 3d. The right of discontinuance is not affected by the Code, but remains the same, both in legal and equitable actions, as under the former practice.

By the common law, neither of the counter-claims here interposed could be pleaded in the action. The one which demands a reformation of the written agreement could only be made available by a suit in equity; and the other, which demands judgment for damages for the alleged violation of his contract by the plaintiff, in excess of the plaintiff's demand, could only be enforced by a separate action. Of course, the subject-matter of the latter counter-claim might be pleaded as a *defense* to the action, either in whole or in part; but the defendant could not in that case recover judgment for any excess of damages sustained by him, over and above the damages sustained by the plaintiff. In brief, at the common law the defendant could only plead such matter in defense, and could not obtain in the action equitable relief, or recover a judgment for damages against the plaintiff, as he now

prepared by myself, it was said that it seemed to be settled on principle and by authority, that the court had power in such cases to grant leave to discontinue, and that the granting or denying such leave is in the sound discretion of the court. If these propositions be correct, it would seem to follow that the order under consideration is not appealable unless there has been abuse of discretion.

But is it true that the court has the power to grant the plaintiff leave to discontinue the whole action, in a case where the defendant

may under proper pleadings and proofs. *Waterman on Set-off, Recoupment, etc.*, 471; 1 Chitty's Pl. 569; 2 Black. Com. (Cooley's ed.) 205, note 19. Hence, all there was of the action at the common law was the cause of action as stated in the declaration, and the defense pleaded thereto by the defendant; and that was all which the plaintiff had an absolute right to discontinue. Such right of discontinuance still remains under the present practice, and, to the extent above indicated, has been rightfully exercised in this case by the plaintiff. The plaintiff's cause of action, and all defenses pleaded thereto which could have been pleaded as such under the former practice, have disappeared from the cause by force of the order of discontinuance.

But we are unable to perceive how it can be held, upon any logical principle, that such discontinuance necessarily carried with it those proceedings of the defendant which the Code permits him to institute in the action, or rather to engraft upon it, but which are, in substance and effect, actions brought by the defendant against plaintiff. Had these proceedings been under the common-law practice, as already observed, the counter-claims interposed in this action would have been asserted in two separate and distinct actions, one at law and the other in equity, in both of which the position of the parties would be the reverse of their position in the present action. In such case, surely the discontinuance by the plaintiff of the action brought by him would not work a discontinuance of such other actions brought against him. Why should the plaintiff's discontinuance of his action lead to that result under the present practice? The learned counsel for the plaintiff have failed to answer this question satisfactorily, and we freely confess our inability to do so.

The cases decided by the various courts of New York upon the subject of the right of discontinuance under the Code are conflicting, and quite unsatisfactory; and we can get but little aid from them in determining the question under consideration.

It may be stated, in support of the views above expressed, that this right or practice of counter-claim is borrowed from the civil law, where it is designated "demand in reconvention;" and the Louisiana cases referred to by the learned counsel for the defendant clearly show that, by the rules of the civil law, a discontinuance of the action by the plaintiff is ineffectual to put a defendant out of court who has interposed a "demand in reconvention."

If the foregoing views are correct, it necessarily follows that the discontinuance of his action by the plaintiff left the issues made by the counter-claim and the reply thereto, pending in court and for trial, and that the court ruled correctly in refusing to strike the cause from the calendar. If application be made for that purpose, the county court should, under the special circumstances of the case, permit the plaintiff to vacate the order of discontinuance so entered by him, to the end that the whole controversy between the parties may be adjudicated in this action.

As to the point that the defendant could not properly disregard the order of discontinuance and notice the case for trial, but that he should first have procured that order to be vacated, we think that had the order been made, although erroneously, by the court or some judicial officer having power to make such orders, the point would have been well taken. The case of *Jones v. Dow*, 15 Wis. 532, so holds. But where a mere side-bar order, or order of course, is improperly entered by an attorney, the other party may disregard it.

*The order appealed from is affirmed.*

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has interposed a counter-claim? It cannot be denied that this power has been frequently asserted and exercised by the courts of New York. But in Louisiana, where the system of jurisprudence prevails, from which were borrowed the provisions of our Code of Procedure, relating to counter-claim, we find that this power has been uniformly denied. *Lanusse's Syndics v. Pimpionella*, 4 Martin, 439, is a leading case on the subject in that State. It was decided in 1826, and so far as we can learn has been followed and acquiesced in ever since, in that State. The defendant pleaded in *reconvention*, that is, he interposed a counter-claim to the action, and demanded judgment thereon. The plaintiff applied to the court for leave to discontinue. Leave was denied, and the ruling was held to be correct. The principles upon which the decision is based are so clearly stated by PORTER, J., that no apology is necessary for quoting at some length from his opinion. Before doing so, however, it should be observed that the term "*demand in reconvention*," in the law of Louisiana, is equivalent to the term "counter-claim," as used in our law, and to "*reconvens*" is equivalent to interposing a counter-claim in the answer. Such pleading is denominated a "*plea of reconvention*." The language of the opinion (omitting the references to foreign authorities, chiefly Spanish) is as follows:

"The right of the defendant to reconvene the plaintiffs in the same suit in which the latter makes a demand of him, though as clearly established by the ancient laws of this country as any other principle found in them, and though of familiar use among all the modern nations whose jurisprudence is derived from the same origin as ours, has but recently been put into practice in this State. The first case in which it was expressly recognized by this court was that of *Evans v. Gray*. The legislature have since acted on it, but they have done no more than establish the general principles, leaving the particular questions which might arise to be decided by deductions from those general principles; or by reference to the Spanish jurisprudence, where not only the same general rules are found, but the modifications which they have received in their application to particular cases.

"Whether the plaintiff can discontinue his action, and by this means put both himself and the defendant out of court, will depend in some measure on ascertaining in what light he is to be viewed in relation to the demand in reconvention; whether he be not *quoad*

this demand really defendant ; for, if he is, it would seem to follow as a consequence, that he cannot exercise a right which is given to those asking a judgment against others, and who are therefore left at liberty to enforce their claims in the manner and at the time which their interests may dictate. He stands, on the contrary, according to the hypothesis just put, in a situation where every imaginable reason is opposed to the exercise of such a privilege. There would be few judgments, we imagine, rendered in this country or any other, if the party against whom condemnation was prayed, and against whom it was about to be pronounced, could arrest the sentence by the expression of a wish that it should be postponed to another time, or by desiring that the suit against him should be discontinued.

"Now, with the exception that the defendant, who sets up the plea of reconvention, is not the party with whom the cause originates, it is not seen by us, in relation to such claim, in what other light he can be viewed than as plaintiff. In all these things which essentially distinguish the one from the other, he certainly is ; his demand is not merely that the plaintiff shall not have judgment, but that he shall be obliged to render to the defendant something that is withheld from him. On the judgment which might be rendered on this demand, the same consequences would follow as if the suit had been commenced by original petition instead of one in reconvention.

"It follows, then, that every consideration which prohibits the defendant from withdrawing from a cause applies with equal force against allowing the plaintiff to discontinue the demand presented against him ; and if the reasoning, from general principles on which this conclusion has been obtained, required any aid from the practice in the Spanish courts, the books which treat of it are clear and express, that in those tribunals he had no power to do so. \* \* \* The terms used in the laws on this subject, and by the writers who comment on them, by which the party who sets up this plea is called the *defendant*, and he against whom it is used is styled *plaintiff*, cannot change the nature of things. These terms are resorted to from necessity, to avoid confusion in explaining by whom and against whom this right can be exercised."

We look in vain in the New York cases for any satisfactory statement of the grounds upon which to sustain the contrary doctrine,



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which seems to prevail in that State. Even though we may not be bound by the rules of law on the subject which obtain in those countries from whose jurisprudence we have borrowed our law of counter-claim, still we are convinced that the views of the Louisiana court are correct in principle, and we therefore adopt the decisions of that court on the question we are considering as the law of this case.

In respect to the remark in the manuscript opinion, to which reference has been made, it was in no way essential to the decision of the question before the court, but was made for the purpose of indicating the proper practice in the future progress of the cause. It was clearly *obiter dictum*, and not binding upon the court. And because we all believe that it is wrong in principle, it has been thought best to omit it from the printed report of the case.

The remaining question is, does the order appealed from involve the merits of the action? If it does, it is an appealable order, and the motion must be denied. If it does not, it is not appealable, and the motion must be granted.

Our conclusion is that this question must be answered in the affirmative. It was held, on a motion to dismiss a former appeal in this action, that an order which involved the question of the existence of the action necessarily involved the merits. 30 Wia. 324. Here also the question involved in the order from which this appeal was taken is of the same character. It is, whether the action shall or shall not remain in court for trial and adjudication. If the former order involved the merits of the action, I think it must be held that the latter does also.

We are aware that an application of the principles here asserted must necessarily work an affirmance of the order appealed from, but it seemed impossible to decide the motion to dismiss the appeal without passing upon the merits of such order.

The motion to dismiss the appeal is denied.

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Hayes v. The City of Oshkosh.

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## HAYES V. THE CITY OF OSHKOSH.

(22 Wis. 214.)

*Municipal corporation — liability for injuries occasioned by fire department*

Plaintiff's property was destroyed by means of sparks thrown from a steam fire-engine belonging to a city, and engaged at the time in extinguishing a fire. The injury was occasioned by the negligence of those in charge of the engine, who were employed and paid by the city. *Held*, that the city was not liable for the injury.

ACTION to recover the value of goods alleged to have been lost through the negligence of defendant's agents.

The complaint alleged that the goods were burned by means of sparks from a steam fire-engine belonging to the defendant, a municipal corporation; that the engine was at the time engaged in extinguishing a fire near plaintiff's goods, and that, by reason of the negligence and carelessness of those in charge of the engine, sparks and cinders were allowed to escape, whereby the damage was done. Those in charge of the engine were employed and paid by the defendant.

Answer a general denial. The evidence tended to support the complaint, but the judge ordered a verdict and judgment for the defendant, and plaintiff appealed.

*C. Coolbaugh & Son*, for appellant.

*W. R. Kennedy and Gabe Bouck*, for respondent.

DIXON, C. J. The question presented in this case is settled by authority as fully and conclusively as any of a judicial nature can ever be said to have been. The precise question may not have been heretofore decided by this court, but a very similar one has, and the governing principle recognized and affirmed. *Kelley v. Milwaukee*, 18 Wis. 83. Neither the charter of the city of Oshkosh, nor the general statutes of this State contain any peculiar provision imposing liability in cases of this kind; and the decisions elsewhere are numerous and uniform that no such liability exists on the part

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of the city. The case made by the plaintiff is in no material respect distinguishable from those adjudicated in *Hafford v. New Bedford*, 16 Gray, 297; *Fisher v. Boston*, 104 Mass. 87; S. C., 6 Am. Rep. 196, as well as in several other reported decisions cited in the briefs of counsel, and in all of which it was held that the actions could not be maintained.

The grounds of exemption from liability, as stated in the authorities last named, are that the corporation is engaged in the performance of a public service, in which it has no particular interest, and from which it derives no special benefit or advantage in its corporate capacity, but which it is bound to see performed in pursuance of a duty imposed by law for the general welfare of the inhabitants, or of the community; that the members of the fire department, although appointed by the city corporation, are not, when acting in the discharge of their duties, servants or agents in the employment of the city, for whose conduct the city can be held liable; but they act rather as public officers, or officers of the city charged with a public service, for whose negligence or misconduct in the discharge of official duty no action will lie against the city, unless expressly given, and hence the maxim *respondet superior* has no application.

The reasons thus given are satisfactory to our minds, and lead to a conclusion which, on the whole, seems to us to be just and proper. Individual hardship or loss must sometimes be endured, in order that still greater hardship or loss to the public at large or the community may be averted. It would seem to be a hard rule which would hold the city responsible in damages in such cases, when the work in which it, or rather its public officers, are engaged, is one of mere good will, a charity, so to speak, designed for the relief of suffering members of the community, or it may be of the entire people of the district. If the legislature sees fit to enact such liability, so let it be; but, in the absence of such enactment, we must hold the liability does not exist.

*Judgment affirmed.*

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Barden v. Supervisors of Columbia County.

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**BARDEN V. SUPERVISORS OF COLUMBIA COUNTY.**

(88 Wis. 445.)

*Revenue stamps — on certificates of tax sales.*

Congress has no authority to impose a stamp duty on certificates of sale of lands for taxes, and where a stamp is placed upon such certificate and is included in the amount for which the land was sold, the sale is void.

ACTION to recover the amount paid by plaintiff on certain tax certificates. Plaintiff had filed with the clerk of the county board of supervisors his claim for the amount paid by him at two tax sales, upon the ground, among others, that each of the sales was invalid because a five cent United States revenue stamp had been included in the amount for which each tract was sold. The board refused to allow the claim, and from its decision plaintiff appealed to the Circuit Court, under the provisions of chapter 13, Revised Statutes, and the acts amendatory thereof. The Circuit Court found that the tax certificates bore a revenue stamp of five cents each, and that this sum was included in the amount for which each tract was sold; that these amounts were in addition to the tax returned, interest, advertising fee, certificates and all other legal charges, and were entered upon the books of the office as a part of the amount to be paid to make redemption. As a conclusion of law, the court found that the sales were illegal and void, and that the county was liable to repay the amount. Judgment for plaintiff accordingly, from which defendant appealed.

*Emmons Taylor*, for appellant.

*G. C. Prentiss*, for respondent.

COLE, J. In this case the Circuit Court found as a fact established by the evidence, that the sum of five cents for each tax certificate was included in the amount for which the land described in such certificate was sold, and that this was in addition to the tax returned, interest, and all other legal charges. And one of the principal questions for our consideration is, did this addition of

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five cents, for a United States revenue stamp, to the taxes for which the lands could properly be sold, render the sales illegal and void? We think this question must be answered in the affirmative. In the cases of *Jones v. The Estate of Keep*, 19 Wis. 369; *Sayles v. Davis*, 22 id. 222, and *Delorme v. Ferk*, 24 id. 201, this court decided that congress had no constitutional power to impose a tax upon the means or instrumentalities employed by the States for the exercise of their essential functions of government; that congress could not tax the process of a State court, nor require a tax deed to be stamped to render it valid. It follows, of course, from this doctrine, that congress could not impose a tax upon a tax certificate issued by State authority at a tax sale. And it further results from the decisions in *Kimball v. Ballard*, 19 Wis. 601; *Warner v. Supervisors*, id. 611, and *Pierce v. Schutt*, 20 id. 424, that including five cents for a revenue stamp in the amount for which the lands were sold, rendered the sales void.

Both sales were made and the tax certificates issued after chapter 159, Laws of 1863, took effect; and it is said even if congress had no authority without the consent of the State to impose a tax upon a certificate issued at a tax sale, it may do so with the concurrent action of the State. The only objection to the imposition of a stamp duty by congress upon instruments of this kind, it is said, is, that it might impede the State in the collection of its revenues; and if the State consents that the stamp duty may be imposed upon tax certificates, does not this render the imposition valid?

The question was stated by Mr. Justice PAINÉ in delivering the opinion of the court in *Delorme v. Ferk*, whether it would be competent for a State legislature to give any additional validity to a stamp tax imposed directly by the federal government and payable into its treasury? It did not become necessary to decide the interesting question in that case, nor do we find it necessary to pass upon it now. That it is not one free from difficulty will be seen upon a little examination and reflection. Suppose a State legislature should attempt to subordinate its powers as a State to the will of congress, could it thus abdicate its authority? Or suppose, what has already happened, that congress should again impose a tax upon the salaries of the judicial and administrative officers of the States, and the State legislature should consent to the imposition. Would this validate the tax? It seems to us it would be rather dangerous doctrine to so affirm. But no matter. We do

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not think the legislature, in enacting the law of 1863, did intend "to supply any invalidity in the laws of congress" in imposing a stamp duty on a tax certificate, "or to give them any greater force or efficacy than they would otherwise have." Reliance is placed upon the second section of the act of 1863 as evincing an intention or purpose of this kind on the part of the legislature. That section reads as follows: "The cost of all stamps required by the laws of the United States to be affixed to the certificate of sale of any land sold for taxes, interest and charges, in any year in pursuance of law, shall be a lien thereon until paid, equally with the unpaid taxes; and the county or city treasurer selling such land is hereby required to include the cost of such stamps as a part of the charges due thereon, in the amount for which such land shall be sold."

Now it is claimed on the part of the defendant that this provision clearly recognizes the necessity of affixing a stamp to certificates of sale of land sold for taxes. This is undeniably so. But we know historically that this law was enacted before the power of congress to impose a stamp duty on a tax deed or tax certificate issued under State authority was seriously questioned. And, as remarked by Mr. Justice PAINÉ in *Delorme v. Ferk*, the law proceeds upon the assumption that the act of the United States imposing such a tax was valid, and then provides a way for collecting the cost of the stamp out of the land which may be sold for taxes. But it is not supposable that the legislature would have made any such provision, had the question been raised and decided that the taxing power of the federal government did not extend to tax deeds and tax certificates executed and issued by State officers on tax sales. And therefore it seems to us there is no ground for holding that the legislature, in enacting this section, intended to cure any defect in the laws of congress upon the subject, or to give to those laws any greater force and efficacy than they would otherwise have. The legislature was not enacting laws in aid of those passed by congress, or attempting to superadd any thing to those laws. But, acting upon the assumption that a tax deed and a tax certificate would be invalid unless stamped, a way was provided for collecting the cost of the stamp, in order that the expense thereof might not come out of the county or State treasury. Hence by the first section it is enacted that no officer shall be obliged to execute and deliver a conveyance or other instrument upon which a stamp is imposed by the

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laws of the United States, until the party entitled to receive the same shall furnish the officer the proper stamp. And the second section makes the cost of the stamp a lien upon the land equally with the unpaid taxes, and provides that it may be included in the amount for which the land is sold. But the only object of all this was to protect the State officers in respect to stamps, and to make the expense of them chargeable upon the land sold. And we think it is very clear that there was no intention on the part of the legislature to legalize the stamp duty, and make it applicable to these instruments, but to leave the revenue laws of congress to operate according to their own force and validity.

This action was brought under section 26, chapter 22, Laws of 1859, to recover of the county the amount paid on the tax certificates, and interest. If the sales were void by reason of including five cents for a revenue stamp in the amount for which the lands were sold, then we suppose the county was liable to refund the amount. The section just referred to provides that if the clerk of the board of supervisors shall discover that for any error or irregularity the lands sold ought not to be conveyed, he shall not convey them, and the county treasurer is required on demand to refund the amount paid therefor on the sale, with interest, to the purchaser or assigns. "This enactment makes the county liable for the amount due upon tax certificates, where error or irregularity has intervened in the proceedings so as to invalidate the sale, and it imposes upon the treasurer the clear duty of refunding the money, with interest, out of the county treasury." *State ex rel. Wolf v. The Board of Supervisors of Sheboygan Co.*, 29 Wis. 79-82. The fact that the plaintiff presented his claim to the county board instead of applying to the county treasurer, to refund the money, cannot upon the facts prejudice his claim.

The learned counsel for the defendant insists that the plaintiff has no right to recover the money paid upon the certificates, even if the sales were void, because he says he might take a tax deed, and bring an action to bar the original owner, when he would either recover the land itself or all the taxes which he had paid, with a high rate of interest, under the subsequent provisions of chapter 22. We do not think the plaintiff was confined to this course of proceeding. The county has obtained his money upon void tax certificates, and upon general principles he is entitled to have his money refunded, with legal interest. *Warner v. Supervisors, etc., supra*,

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*Norton v. The Supervisors of Rock Co.*, 13 Wis. 612; *Hutchinson v. Supervisors of Sheboygan Co.*, 26 id. 402.

We express no opinion upon the other question discussed by counsel, namely, whether the affidavits of posting notices of sale were defective or not. The point already decided disposes of the case and renders a consideration of that question unnecessary.

*Judgment affirmed.*

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MATTESON V. ELLSWORTH.

(28 Wis. 422.)

*Promissory note — alteration of — recovery on original claim.*

The taking of a promissory note of a debtor does not extinguish the original debt or operate as payment, and, therefore, where the payee of a note has, without fraudulent intent, altered it after delivery without the maker's consent, he may, nevertheless, recover upon the original demand.

ACTION on a promissory note. The complaint alleged that defendant was, on June 3, 1867, indebted to plaintiff in the sum of \$200 principal and \$100 interest; that on that day defendant executed and delivered to plaintiff his promissory note for \$300, and that said note was due. Answer that defendant executed and delivered a note for \$200 only, and that after such delivery plaintiff fraudulently altered the note by changing the figure "2" to the figure "3," so as to make the note for \$300; that defendant never assented to such alteration, and that this was the note mentioned in the complaint.

Thereupon the court permitted an amendment of the complaint so as to set forth the original indebtedness as a cause of action. Upon the trial the evidence tended to show that the note was given for a loan of \$200, and that it was subsequently altered so as to include interest, etc., amounting to \$100. Defendant's evidence was to the effect that he never assented to the alteration of the note, and that he was not indebted to the plaintiff for the additional \$100.

The court instructed the jury that plaintiff was entitled to recover \$200, with interest from June 14, 1867; and the only ques-



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tion they were to determine was, whether defendant was indebted to her for the further sum of \$100 and interest, as she claimed; that the presumption of law was, that defendant did not assent to the alteration of the note, which presumption must be overcome by weight of evidence to the contrary; that if the alteration was made without defendant's consent, and was not subsequently assented to by him, then the note was void, and the plaintiff could recover the additional \$100, if at all, only upon the other evidence in the case.

The court refused successively several instructions asked for the defendant, which were in substance: 1. That if she had altered the note without defendant's consent, the verdict must be for defendant. 2. That if the \$200 specified in the first count of the complaint were advanced under an agreement that a note should be given for the same, which note was delivered by defendant to plaintiff before the money was delivered, and if such note had not been canceled or surrendered, plaintiff could not recover said \$200, except upon the note. 3. That the jury could not consider the evidence given to sustain the second and third causes of action, because, by plaintiff's own showing, if any such causes of action ever existed, a note was given for the amount, upon which recovery must be had, if at all, in this action.

Verdict for plaintiff for \$321; and from a judgment thereon defendant appealed.

*Moses Hooper*, for appellant.

*Gillet & Taylor*, for respondent.

COLL, J. The counsel for the defendant insists that the Circuit Court erred in allowing three new and distinct causes of action to be inserted in the complaint as an amendment of the same, on the trial. But this amendment amounted to nothing more than stating the original consideration of the note sued on. It was what would have been termed, under the former system of pleading, adding the common counts to the special count. It was doubtless competent for the court to allow the amendment, and it could not possibly have prejudiced the defendant in any way.

Nor do we think there was any error in refusing the defendant's motion to compel the plaintiff to elect whether she would proceed upon the claim for money loaned and interest, or upon the note.

This was a matter resting in the discretion of the court. Both claims were for the same money, and there was no inconsistency in the plaintiff seeking to recover on the original indebtedness, if she should fail to prove that the note was altered with defendant's consent.

A number of instructions were asked on the part of the defendant, which, we think, were properly refused. A few general remarks will express all that we deem it necessary to say in reference to these instructions, and exceptions taken to certain portions of the charge of the court.

In the first place, it will be borne in mind that the note was offered in evidence on the trial, and of course was canceled by the judgment. Again, it is to be observed that the court in effect charged the jury that if they found that the note was altered by the plaintiff after it was made, without the consent of the defendant, then there could be no recovery upon the note. The instructions of the defendant assumed that there could be no recovery in the case unless upon the note. Why not? The giving of that note did not extinguish the debt due the plaintiff from the defendant. This proposition is too obviously correct to need illustration or comment. And therefore, assuming that there could be no recovery upon the note on account of its unauthorized alteration by the plaintiff, still what rule of law prevents a recovery on the other causes of action stated in the complaint? These were the counts for money loaned and interest. We are unable to perceive any objection to a recovery upon those causes of action, providing they were sustained by the evidence. The defendant himself testified on the trial that he had received \$200 which was loaned him by the plaintiff. He does not pretend that this money has ever been paid. And the instructions assume that there could be no recovery for this amount admitted to be due the plaintiff.

It is said, if the note was altered from \$200 to \$300, without the consent or ratification by the defendant, that then there could be no recovery on the original consideration. It seems to us that this is an erroneous view of the matter. If the note was altered without the consent of the defendant, it is conceded that there could be no recovery upon it. But the original indebtedness still remains. That has not been satisfied and discharged. The position of the defendant is simply this: he admits that he had \$200 of the plaintiff's money, which he has never paid; and that he gave a promiss-

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ery note for the amount ; but he alleges that this has been altered without his consent, and that therefore there can be no recovery for the money conceded to be due the plaintiff. This would be a strange condition of the law, if such a defense were good and sanctioned by it. And this is the manifest error in the instructions asked on the part of the defendant — that there could be no recovery on the other causes of action stated in the complaint, if the note had been altered so that there could be no recovery upon it. Since the plaintiff produced the note, and in effect canceled it on the trial, we know of no principle which would prevent her from recovering upon the original consideration for which the note was given. So, whether the jury found that the note was altered with the assent of the defendant, and based their verdict upon it, or based such verdict upon the other causes of action, seems to us quite an immaterial inquiry. There was probably some compromise about the verdict ; but there is evidence to sustain it.

*Judgment affirmed.*

A rehearing was allowed upon appellant's motion, and the following opinion was filed :

COLE, J. A re-argument was granted in this case upon the point whether we were right in holding that the plaintiff could recover upon the original consideration, providing the jury should find from the evidence that the note was altered by her without the consent of the defendant. And it is proper to say in the outset that there is no foundation in the record for imputing to the plaintiff any fraudulent intent or bad motive in making the alteration, even if it was thus made. She accounts for the alteration very naturally by saying that she changed the note from \$200 to \$300 in order to make it include the \$65 note and the \$30 in cash which she sent the defendant from St. Paul, subsequent to the execution of this note, and that she informed the defendant of what she had done, and that he afterward recognized the validity of this note, and paid interest upon it. It is true the defendant denies that he ever recognized the validity of the note or knew of its alteration, and he says that in fact he only had \$200 of the plaintiff, and that he never received, after the \$200 note was executed, any other note or money through the mail, as testified to by the plaintiff. But it is very manifest from the verdict of the jury that they did not

credit his statements in regard to his indebtedness to the plaintiff, and it is perhaps the most natural inference from the verdict that the jury found that the defendant assented to the alteration. But at all events the question of fraudulent intent is out of the case, there being no evidence upon which to found such an imputation—the error complained of on this branch of the case really being the refusal of the court to give certain instructions asked by the defendant, and exceptions taken to certain portions of the charge. And those instructions and exceptions raise for consideration this simple question, whether, if the proof showed that the plaintiff altered the note without the consent of the defendant—though from no improper motive, but supposing that she had the right under the circumstances to do so—the law will permit her to recover upon the other causes of action stated in the complaint, which are founded upon the original consideration of the note. In the former opinion it was held that she might recover, and the correctness of this conclusion was the only point we desired further argument upon. And we now think our first view of the case was correct, and that the alteration did not destroy the right of action for the money actually loaned. The position of defendant's counsel is, as we understand it, that the note is the only means by which the plaintiff derives a right of action. If the note has been altered so that no recovery can be had upon it, the right of action is totally extinct and gone. His fundamental proposition is, in the language of the note to *Waring v. Smith*, 2 Barb. Ch. 119–125, that “where an agreement is reduced to writing, whether under seal or not, so as to merge the original promise, and the written agreement is so altered as to avoid it, the party cannot resort to the original contract.” And he cites in support of this proposition *Martendale v. Follett*, 1 N. H. 95; *Wheelock v. Freeman*, 13 Pick. 165; *Byles on Bills*, side page, 257, note 1; *Smith v. Mace*, 44 N. H. 553; *Bigelow v. Stilphen*, 35 Vt. 521; *White v. Huss*, 32 Ala. 430; *Newell v. Mayberry*, 3 Leigh, 250; *Mills v. Starr*, 2 Bailey (S. C.), 359; *Wood v. Steele*, 6 Wall. 80; *Whitmer v. Frye*, 10 Mo. 349.

In the cases of *Waring v. Smith*, *Wheelock v. Freeman*, *Newell v. Mayberry*, and *Wood v. Steele*, the original promise was merged in the written agreement, and the plaintiff's only right of action was derived from, and was founded on, such written contract. In *Bigelow v. Stilphen*, where the court thought that the weight of

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authority was in favor of the doctrine that an alteration of a note worked the forfeiture of the debt, and that there could be no recovery for the original consideration, still they held that while Cook was the agent of the plaintiffs to sell the property for which the note in question was given, and also their agent to take it and transmit it to them, yet he was not their agent to alter it, and that they were in no respect responsible for his acts in making the alteration, and did not ratify them by bringing suit upon that note. The act of Cook, therefore, in altering the note was regarded as the act of a stranger, and in no way affecting the validity of the note as originally drawn. *Whitmer v. Frye* was "an action of debt on a sealed instrument," and "the declaration contained a count on the instrument, and the money counts." The court says that "where a party, by his own act, renders an instrument so that it cannot be the foundation of any legal remedy, he will not be permitted to prove the covenant or promise contained in it by other evidence, and that this principle will prevent a resort to the common courts in order to sustain the plaintiff's right of recovery." In this case there might well be held to be a merger of the simple contract in the instrument under seal, though this reason for the decision is not given. In *White v. Huss*, the court say in the opinion that, if the plaintiff failed to prove the assent of the defendant to the alteration of the note, "he was not entitled to recover, either upon the note, or under any count founded on the same consideration with the note," for, "as the note was at first valid, there can be no recovery upon the contract unless the note still continues valid, and is produced in evidence or proved to have been lost by time or accident." *Mills v. Starr* was an action upon a sealed note, and for goods sold and delivered, and an *insimul computassent*. The several counts were for the same debt. The note appeared to have been altered so that there could be no recovery upon it. The court said: "Here the debt was originally an account, a simple contract debt; the plaintiff's intestate accepted a specialty, a note under seal, and that, according to the last rule, was an extinguishment of the account." *Martendale v. Follett* and *Smith v. Mace* seem to go upon the assumption that a fraudulent alteration of a promissory note operates really as an extinguishment of the debt for which it is given. In the latter case Mr. Justice BELLows observes that "the discharge of the notes by a release would discharge also the original contract; and we think that the same effect

would be produced by such a fraudulent alteration of the notes by the vendor as would render them void."

Now it seems to me that the rule laid down in some of the foregoing cases, that an unauthorized alteration of a promissory note not only avoids the instrument and prevents a recovery upon it, but also destroys the right of action upon the original consideration, ought not to be followed in this State, where it has been uniformly held that the taking of the promissory note of the debtor does not extinguish the original debt, nor operate as a payment, unless so agreed by the parties. Of course there is no question of merger under the decisions of this State, as the promissory note is only another security for the original debt. It is not like the case of a bond or other sealed instrument, given for a simple contract, where the latter is said to be merged or swallowed up in that under seal. In *Ford v. Mitchell*, 15 Wis. 308, and *Paine v. Voorhies*, 26 id. 526, the doctrine is said to be well settled, that "the taking of a promissory note, either for a precedent liability or a debt incurred at the time, is no payment, unless expressly so agreed." See, also, *Williams v. Starr*, 5 Wis. 534; *Blunt v. Walker*, 11 id. 334; *Eastman v. Porter*, 14 id. 40; *Mesheke v. Van Doren*, 16 id. 319. It is the logical result of this rule, that the giving of a promissory note for goods sold or money loaned is no payment or extinguishment of the debt, unless such was the agreement, and that the taking of the note only suspends the action on the contract until the note is due. *Porter v. Talbott*, 1 Cowen, 359; *Coddes v. Cumming*, 6 id. 181. But when the term of credit has expired, the creditor may bring his action and recover either upon the original consideration or on the note, as he may elect. *Bullock v. Green*, 15 Johns. 247; *Jones v. Savage*, 6 Wend. 658; *Butler v. Haight*, 8 id. 535; *Dayton v. Trull*, 23 id. 345; *Price v. Price*, 16 M. & W. 239. In *Wright v. The First Crockery Ware Co.*, 1 N. H. 281, WOODBURY, J., states the common law rule upon this subject as follows: "If a person sells goods and pays money, and at the same time receives therefor the note of a third person payable to himself, or any note or bill not having the name of the person with whom he deals upon it, it will be presumed to be a sale of the note, and to be in satisfaction, until the contrary appears. The rule is different, however, when such note is received for a precedent debt. But if the creditor receive the note or bill of his debtor, or of a third person indorsed by the debtor, either for a precedent debt or a debt arising at the

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time, it is not presumed it has been received in satisfaction." The case is approved in the subsequent one of *Jaffrey v. Cornish*, 10 N. H. 505. And see cases cited in note *m*, p. 156, 2 Parsons on Notes and Bills. The rule, therefore, being in this State, as before observed, that the promissory note of the debtor is not a payment or extinguishment of the debt for money loaned or goods sold, though given at the time, but a concurrent security, which the creditor, when due, has his right of action upon, or upon the original contract, and the plaintiff not relying upon the altered note as the foundation of the right of recovery, but resorting to her remedy on the other counts, why should she not recover the money actually loaned the defendant? Why should the alteration of the note be attended with any such destructive consequences as the forfeiture of the money actually loaned?

The counsel for the defendant says there never was any right of action except upon the note. But this is assuming the point in controversy. It is well to remember that the note does not show the real terms of the loan, according to the concessions of counsel on both sides. When the note was signed by defendant, it drew interest at twelve per cent. But in his letter of the 10th of June, 1867, on returning the note to the plaintiff, he says: "The rate is too high; there is plenty of money here at ten per cent. I will take it at that if you see fit." This was a modification of the terms of the loan, and shows that the real contract is not embodied in the note. The note, however, became void in consequence of the alteration, and of itself cannot be the foundation of a recovery in any form of action. But the debt for the money loaned still exists. Prof. Parsons states the effects of an alteration of a note as follows: "An alteration by the original payee of a note, or by the drawer or payee of a bill, if not fraudulent, although it avoids the instrument and so destroys their claim under it, may still remit them to their original consideration, and revive their claim under it." 2 Pars. on Notes and Bills, p. 571. Chitty says: "The material alteration, as in the case of subsequent usury, does not extinguish the *prior* debt; and between the original parties the original debt or consideration is recoverable upon adducing their evidence in proof thereof." Chitty on Bills, 212. See *Atkinson v. Hawdon*, 29 Eng. C. L. 169; *Alves v. Hodgson*, 7 Term R. 241; *Farr v. Price*, 1 East, 55, note *a*, p. 58; *Steele v. Norton*, 9 Mees. & Wels. 309; *Sutton v. Toomer*, 14 Eng. C. L. 66; *Sloman v. Cox*, 1 C. M. & R. 471;

*Morrison v. Welty*, 18 Md. 169; *Clute v. Small*, 17 Wend. 238. Even in the celebrated case of *Master v. Miller*, 4 Term R. 320, which was an action by indorsers against the acceptor of a bill of exchange, where the date of the bill had been altered after acceptance, Lord KENYON, C. J., opens his opinion as follows: "The question is not whether or not another action may not be framed to give the plaintiffs some remedy, but whether this action can be sustained by these parties on this instrument—for the instrument is the only means by which they can derive a right of action. The right of action which subsisted in favor of Wilkinson and Cooke could not be transferred to the plaintiffs in any other mode than this, inasmuch as a chose in action is not assignable at law." But the implication is that Wilkinson and Cooke might have recovered on the money counts, if they had brought the action; and Mr. Justice BULLER is astonished "that a jury of merchants should hesitate a moment in finding a verdict generally for the plaintiffs." *Smith's Lead. Cas.*, vol. 1, part 2, p. 1141. And we think the better authority is, that "an unauthorized alteration of the note works no forfeiture of the debt, so that there can be no recovery by the party making such alteration, for the original consideration for which the obligation was given;" and that this rule necessarily results from our decisions that the taking of the note of the debtor is not a payment or extinguishment of the demand for which it is given. Courts have sometimes treated the subject as though there were some uncompromising principle of public policy involved, which prohibited all recovery by the party making the alteration. But the effect of an alteration has frequently been obviated in England since the adoption of the rules of Hen. 4, Wm. 4, as will be seen in *Sibley v. Fisher*, 7 A. & E. 444; *Hemming v. Trenergy*, 9 id. 926; *Mason v. Bradley*, 11 Mees. & Wels. 590; *Davidson v. Cooper*, id. 778, and *Parry v. Nicholson*, 13 id. 778, from which it is apparent that the courts in that country do not so regard the matter.

The alteration of a promissory note is not to be visited with the same consequences in respect to a right of action on the original debt, as a note given on a usurious loan. For in the latter case the contract for the loan is void, and all securities given for it are void. There is no valid obligation or demand which the creditor can recover upon, since the statute condemns all usurious loans and all securities tainted with usury. The distinction between such a case



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and the one under consideration is very marked, and need not be dwelt upon.

It follows from these views that the judgment of the Circuit Court must be affirmed.

*Judgment affirmed.*

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## HUBBARD V. WESTERN UNION TELEGRAPH COMPANY.

(28 Wls. 552.)

*Telegraph — conditions on message — damages.*

A condition upon a blank for a telegraph message relieving the company from liability for errors or delays in transmission or delivery, or for non-delivery of messages, will not relieve them from liability for a negligent omission to deliver a message written on such a blank.

A message sent by plaintiff, but not delivered by defendant, directed plaintiff's agent to buy a certain quantity of wheat, to be delivered at any time in June at seller's option. The price of wheat fluctuated during the month of June, but was at the close of the month less than on the day when the message should have been delivered. *Held*, that the court could not presume that the plaintiff would have sold at the right time to make a profit, had the wheat been bought, and that he was, therefore, only entitled to nominal damages.

**ACTION** to recover damages for failure to deliver a telegram.  
**Trial** by court without a jury.

The court held that defendant was guilty of negligence in failing to deliver such message, and became liable to plaintiffs for any damages sustained by them; but that "no injury had been sustained by plaintiffs which the court could compute in damages," and judgment was accordingly entered for defendant. From this judgment the plaintiffs appealed.

The facts upon which the claim of plaintiffs was based are more fully stated in the opinion.

*Enmons & Hamilton*, for appellants.

*Finches, Lynde & Miller*, for respondent.

**COLE, J.** The facts of this case, upon which the questions of law arise, are few and undisputed. The plaintiffs, who were engaged

in buying and selling grain in Milwaukee, through their agent, on the 6th of May, 1872, at Port Huron, Michigan, delivered at about 7:25 P. M., to the defendant company for transmission over its line, a message directed to their agent at Milwaukee, in the following language: "Buy twenty thousand, seller June, pay telegraph there." This message was written upon one of the printed blanks furnished by the company for the transmission of night dispatches, and was sent by the company to its agent at Milwaukee during the night of the 6th, and could have been delivered to the agent of the plaintiffs by 9 A. M. of the 7th, but was never delivered, and was lost. On the trial no explanation was given, nor excuse shown, on the part of the company, to account for the non-delivery of the dispatch. It is admitted that the message meant, and would have been understood by plaintiff's agent, as directing him to buy twenty thousand bushels of No. 2 wheat, deliverable during the month of June, and that he was to pay the expense of sending the dispatch. If the agent had received the dispatch on the 7th, when it should have been delivered, he could and would have purchased wheat at Milwaukee for the market price of \$1.48 per bushel. Wheat advanced in the market on the 8th to \$1.55 per bushel, when the agent sold some at that price. The agent received from the plaintiffs on the 8th, in the afternoon, a letter advising him of the sending of the dispatch. From the 8th of May to the 29th of June wheat fluctuated in price, and on the last-named day, being Saturday, and also being the last day the seller would have had for the delivery of the wheat, had a contract been entered into according to the dispatch, its market price was \$1.23 3-4 per bushel. The contemplated bargain or transaction was what is termed in the chamber of commerce of Milwaukee "buying on option," which means that the seller should deliver the wheat sold at any time at his own option in the month of June. The plaintiff's agent, on the receipt of the letter on the 8th of May, took no steps to make the purchase, and no purchase was in fact ever made, as intended when the dispatch was delivered to the company for transmission. The action is brought to recover damages alleged to have been sustained by the plaintiffs in consequence of the non-delivery of the dispatch.

The blanks furnished by the company for night dispatches, and subject to which the message in question was sent, provide that the company will receive messages for all stations east of the Mississippi river, to be sent during the night, at one-half of the usual rates, on

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condition that "the company shall not be liable for error or delay in the transmission or delivery, or for non-delivery, of such messages, from whatever cause occurring, and shall only be bound in such case to return the amount paid by the sender."

It is now claimed on the part of the defendant that this stipulation restricting its liability is valid, and exonerates it from payment of all loss or damage which may result from errors or delay in the transmission or delivery, or for the non-delivery, of a night message, from whatever cause occurring. The plaintiffs, it is said, were competent to assent to the stipulation, and did assent to it, and are therefore bound by it, having chosen themselves to take the risk of the dispatch reaching its proper destination. If they were not willing to take that risk, it is said, they should have paid the higher rate and sent the dispatch under the contract for transmitting day messages, in which case the company would have been responsible for the correct transmission and prompt delivery of the dispatch to their agent.

In the case of *Candee* against this same defendant, decided at the present term,\* the validity of this condition exempting the company from liability on account of the negligence of its servants in the performance of their duty, was considered. It was there held that such a regulation, adopted for the purpose of protecting the company against the consequences of the negligence or fraud of its agents, was an unreasonable condition, and was void, as against sound public policy. The course of reasoning by which this conclusion was reached will be seen on reference to the opinion in that case; and no attempt will be made to fortify or add to that reasoning here. It is sufficient to say that, upon the admitted facts, there was a clear breach of duty by the company in failing to deliver the message which it had undertaken for a valuable consideration to transmit and deliver, and that it must be held responsible therefor. The message was received in Milwaukee, and might and should have been delivered to the agent of the plaintiffs by 9 A. M. of the 7th, if the employees of the company had exercised due care and attention to the business which they had undertaken to prosecute. For, in the language of the court, in *Baldwin v. The United States Telegraph Co.*, 45 N. Y. 744-751, "while telegraph companies are not insurers, and do not guaranty

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\* The case here referred to was held on a motion for a rehearing, and will be reported as of the January term, 1874.—*REP.*

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the delivery of all messages with entire accuracy and against all contingencies, they do undertake for ordinary care and vigilance in the performance of their duties, and to answer for the neglect and omission of duty of their servants and agents ;” and this degree of liability the law imposes upon them, as well in the transmission and delivery of a night as of a day dispatch. The defendant company was therefore responsible for the neglect or default of its servants to deliver the message, and must respond for whatever damages the plaintiffs have sustained by reason of such negligence.

And this brings us to a consideration of the important question as to the proper rule of damages applicable to the case. The court below found, as a conclusion of law, that no injury had been sustained by the plaintiffs for which the court could compute damages, and ordered judgment for the defendant. In this we think the court was clearly wrong, because the plaintiffs were entitled to recover nominal damages at least, as the consequence of the breach of contract on the part of the company in failing to deliver the message. But are they further entitled to recover the profits on the expected bargain or purchase which was never made, but which, it is claimed, might have been consummated, had the dispatch been properly delivered? It is argued in their behalf that the company is bound to pay for its default the profit which they might have realized, providing their agent had purchased the twenty thousand bushels of wheat for \$1.48 per bushel, on the 7th of May, and resold the same on the 8th, when wheat was worth \$1.55 per bushel. Is this the true rule of damages applicable to the facts? It seems to us not.

It is a most material fact to be kept in view that no purchase or bargain for wheat was ever made. On the 8th of May, when the agent was informed of the sending of the dispatch, he confessedly took no steps to make the purchase. If the dispatch had been properly delivered on the 7th, and he had made the purchase according to the order of his principals, they would have lost heavily on the contract had they not resold before they actually had the wheat in their possession. For, on the 29th day of June, when the vendor might have delivered on the contract, wheat was worth in the market 24 1-4 cents on a bushel less than when the agent would have purchased. Now, suppose the company had said to plaintiff's agent on the 7th: “Such a dispatch has been received at the

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Milwaukee office, and has been mislaid or lost through the carelessness or fault of our employees, but we will assume the contract you were ordered to make, and deliver the twenty thousand bushels of wheat to your principals, of the designated quality, for \$1.48 per bushel, at our option, in June." What would have been the measure of damages, if the company had made default in the performance of this contract? Mr. Sedgwick lays down the rule on the subject as follows: "When contracts for the sale of chattels are broken by the vendor failing to deliver the property according to the terms of the bargain, it seems to be well settled, as a general rule, both in England and the United States, that the measure of damages is the difference between the contract price and the market value of the article at the time when it should be delivered, upon the ground that this is the plaintiff's real loss, and that with this sum he can go into the market and supply himself with the same article from another vendor. It follows from this rule, that if, at the time fixed for the delivery, the article has not risen in value, the vendee having lost nothing, can recover nothing." Sedg. on Dam. 260. So that it appears, if the company itself stood in the place of the vendor of the wheat and failed to fulfill his contract, the plaintiffs could recover nothing, because they could purchase the wheat on the 29th of June, at 24½ cents on the bushel less than they had agreed to pay. They would, therefore, not have been injured by the company's default to deliver the wheat on its contract. Now, what ground is there for saying that the defendant is in a worse position on account of its failure to deliver the message than it would have been if it had itself assumed the contract as of the time the dispatch should have been delivered? We confess we see no satisfactory reason for extending the liability of the company beyond what it would have been had a contract for the purchase of the wheat been actually made with it, and if it really stood in the place of the vendor. But it is argued, if the message had been promptly delivered the agent might have made the purchase on the 7th, and resold on the 8th, and thus have realized a profit on the speculation. Even if the company were the vendor of the wheat, the plaintiff could not recover this loss of profits on a resale. That question was expressly so decided in *Williams v. Reynolds*, 18 Eng. C. L. 493; and we consider that as a strong authority adverse to the claim of the plaintiffs. That was an action on a contract for the sale of cotton by the defendants to the plaintiff, at the price

of 16½d. per pound, to be delivered in the month of August. The plaintiff contracted to sell the same quantity of cotton, to be delivered in the month of August, at 19½d. per pound. The defendants failed to deliver the cotton sold by them, and the plaintiff was consequently incapacitated from performing his sub-contract for the sale at a higher price. He claimed damages for a breach of the contract by the defendants, including the loss of profit which he would have realized on the resale. But the court held that the proper measure of damages was the difference between the contract price (16½d. per pound) and the price (18½d. per pound) on the last day of delivery, and that the plaintiff was not entitled to recover damages for the loss of profit on his sub-contract. Such damage, the judges in that case say, does not naturally flow from the breach of the contract to deliver; nor is it such as must be deemed within the contemplation of the parties at the time the contract was entered into, in case of a breach of it. The case of *Hadley v. Baxendale*, 9 Exch. 341, is cited as laying down the true rule; a case which this court referred to with approbation in *Shepard v. Milwaukee Gas Light Co.*, 15 Wis. 318. In the Shepard case, Mr. Justice PAINE refers to a class of cases where parties contract for articles with reference to use or sale on some particular occasion, and where, by reason of want of time, or their situation with reference to the market, they are unable to supply themselves for that occasion in case of failure to deliver, where the difference between the contract-price and market-price at the time when they ought to have been delivered does not completely indemnify the injured party. See *Richardson v. Chynoweth*, 26 Wis. 656. But the general rule is—where the action is brought by the vendee for a failure to deliver—the difference between the price agreed to be paid and the market-price of the articles on the day delivery should have been made on the contract. *Havermeyer v. Cunningham*, 35 Barb. 515; *Hamilton v. Ganyard*, 34 id. 204. Now, applying the rule laid down in *Williams v. Reynolds* and *Hadley v. Baxendale*, how can it be said that the loss of profit upon a contract which the agent of the plaintiffs might possibly have entered into, but which he never did, naturally resulted from a failure to deliver the message, or could reasonably be supposed to be within the contemplation of the parties as a probable result of such failure, when the dispatch was left with the company to be sent over its line? If the

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agent had received the dispatch so as to make the purchase on the 7th, what presumption is there that he would have resold at a profit? None whatever. "Selling at a profit is not the natural result of buying with an intention to resell." SHEE, J., *Williams v. Reynolds*. For "that depends on circumstances altogether out of the ordinary course of things." And therefore, if we presume that the agent would have made the purchase according to the order if the dispatch had been delivered, we cannot presume that he would have sold the next day so as to realize a profit. The breach of contract complained of is the failure to deliver the message, and the recovery should be limited to an indemnification of the plaintiffs for actual loss sustained. Profits upon a contract never made are quite too remote and uncertain to be taken into consideration. Nor can it be said that the "parties may fairly be supposed to have contemplated" such profits as an element in the damages which might result from the failure to deliver the dispatch.

Since this opinion was prepared, my attention has been called to the decision of the Court of Appeals of New York, in *Baker v. Drakes* (published in the Alb. Law Jour. Nov. 29, 1873), which in its general reasoning supports the result reached in this case.

It is apparent that in this case there was a technical breach of contract on the part of the company, for which the plaintiffs were entitled to recover nominal damages. But this would be the extent of the recovery. A judgment for nominal damages would not have carried costs, because the action might have been brought in a justice's court. The dispatch was to be paid for on delivery in Milwaukee; but, as it was never delivered, the plaintiffs were at no expense for its transmission. And while the county court was wrong in not rendering judgment for the plaintiffs for nominal damages, yet, in a case like the present, this constitutes no ground for a reversal of the judgment. This point was so ruled in *Laubheimer v. Mann*, 19 Wis. 519; and the doctrine of that case was approved in *Eaton v. Lyman*, 30 Wis. 41, and in *Jones v. King*, *ante*, p. 422. According to the rule laid down and approved in these decisions, the judgment in the present case must be affirmed.

*It is so ordered.*

## NORDEN V. JONES.

(33 Wis. 600.)

*Counter-claim — right to waive a tort and sue in assumpsit.*

A. laid down B.'s fence and turned his cattle in upon B.'s pasture land. *Held*, that B. might waive the tort and set up a claim for pasturage of the cattle as a counter-claim in an action of contract brought against him by A.

ACTION by Norden before a justice of the peace, on a book account, against Jones. Jones filed a counter-claim, and on the trial offered to prove an item, in his account, of \$6 for pasturing plaintiff's cattle. He testified that plaintiff laid down his fence and let the cattle into his pasture. Plaintiff objected to this item as not being a subject of counter-claim, but a trespass on his part. The justice sustained the objection and excluded the item. Verdict and judgment for plaintiff. On appeal to the Circuit Court, the judgment of the justice, excluding the item, was reversed, and the item admitted. Defendant appealed.

DIXON, C. J. [After deciding that the Circuit Court should have wholly reversed the judgment of the justice]: The question presented on the rejection of the \$6 item is an interesting one, upon which there exists considerable contrariety of opinion and decision, both in England and this country. It was a charge of that sum made by the defendant against the plaintiff for pasturing the plaintiff's cattle, which the defendant testified the plaintiff had let into his, the defendant's, field, by laying down defendant's fence for that purpose. The objection sustained by the justice was, that the laying down of the fence and turning in of the cattle was a trespass on the part of the plaintiff, which could not be brought in or proved as a set-off or cross-demand in this form of action, but that the defendant must resort to his action of trespass against the plaintiff to recover the damages which he has sustained. It is not to be denied that there are numerous decisions of most respectable courts sustaining this view, while on the other hand there is an equal weight of most respectable authority also for holding that a promise to pay will be implied under



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Norden v. Jones.

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such circumstances, upon which an action of *assumpsit* may likewise be maintained. The question being new in this court under our present statutes, we are at liberty to adopt such rule as in our judgment will best subserve the ends of justice, which is or ought to be the object of all rules laid down in the course of judicial proceedings. The cases of *Conklin v. Parsons*, 1 Ohand. 240, and *Pierce v. Hoffman*, 4 Wis. 277, were controlled by the language of subdivision 3 of section 1, chap. 94, R. S. 1849, then in force. That subdivision was omitted altogether in the present revision, thus making a material change in the law of set-off. R. S. 1858, chap. 126, § 1 (2 Tay. Stats. 1448, § 1). The language of the court in *Conklin v. Parsons* favors rather than disfavors the general right to waive the tort and sue in *assumpsit* for a mere conversion of property. And see *Keyes v. Railway Co.*, 25 Wis. 691.

Mr. Nicholas Hill, in his notes to the cases of *Putnam v. Wiss*, 1 Hill, 240, and *Berly v. Taylor*, 5 id. 584, has collected nearly all the adjudications up to the time of publication (1844), as well as those which hold the narrower rule, which in general limits the right to waive the tort and sue in *assumpsit* to cases where goods have been taken from the plaintiff and sold by the wrong-doer and the money received by him, as those which establish a more liberal principle by declaring the right of the injured party to waive the tort and bring *assumpsit* in a variety of cases where the fruits of the trespass or wrong have not become or been turned into money or its equivalent in the hands of the tort-feasor. Judge REDFIELD, in *Center Turnpike Co. v. Smith*, 12 Vt. 217, resolves the cases coming within the narrower rule into four classes, to which the case of *Jones v. Hoar*, 5 Pick. 290, adds a fifth class not named by Judge REDFIELD. The underlying question in all the cases obviously is, When and under what circumstances will the law imply a promise on the part of the defendant to pay? "It is a principle well settled," say the court in *Webster v. Drinkwater*, 5 Greenl. 322, "that a promise is not implied against or without the consent of the person attempted to be charged by it. And where one is implied, it is because the party intended it should be, or because natural justice plainly requires it, in consideration of some benefit received." Tested by the latter as the governing principle upon which the law raises a promise to pay, it is very obvious that the more liberal rule is the correct one, and that which should prevail.

And such is the rule for which Mr. Hill contends, of whose great ability and acknowledged attainments in his profession it is unnecessary for us here to speak. It will be conceded by all that his opinion is entitled to very great weight, sustained as he is by the language of the court in the two cases to which his notes are appended, as well as by other decisions to which he refers, and especially those in New Hampshire and Maryland. *Hill v. Davis*, 3 N. H. 384; *Stockett v. Watkins*, 2 Gill & Johns. 326, 342-3. We give the concluding portion or paragraph of his note to the first case, with his citations, as they appear in the volume above referred to. He says: "The above cases from the Maryland and New Hampshire reports are sustained by the *dicta* of JACKSON, J., in a Massachusetts case decided some time previous to *Jones v. Hoar*, *supra* (*Cummings v. Noyes*, 10 Mass. 433, 435-6). And see the observations of MAISON, senator, in *Butts v. Collins*, 13 Wend. 153-4; also *Ford v. Caldwell*, 3 Hill (S. C.), 248, especially the opinion of RICHARDSON, J., p. 250. They seem also in accordance with the principle of several English decisions, viz., that the tort-feasor shall not be allowed, under such circumstances, to set up his own wrongful intent in disavowal of the implied promise which the law would otherwise raise against him. Chitty on Contracts, 6; *Hill v. Perrott*, 3 Taunt. 274-5, *per curiam*; *Lightly v. Clouston*, 1 id. 112, 114, *per* MANSFIELD, C. J.; 1 Leigh's N. P. 4, 5; *per* MAISON, senator, in *Butts v. Collins*, 13 Wend. 154-5. Apart from all reasoning of a technical or artificial character, and looking to the substantial ends of justice, it is quite difficult to see why this principle should not be applied in cases like *Jones v. Hoar* and *Willett v. Willett*, *supra*. In neither could the defendant have been prejudiced by allowing the plaintiff to sue in *assumpsit*. On the contrary, the practice generally operates in favor of the defendant, as the plaintiff thereby foregoes his right to damages for the tort as such, and restricts himself to the simple value of the property. See *per* Lord MANSFIELD, in *Lindon v. Hooper*, 1 Cowp. 419; *per* BAYLEY, J., in *Foster v. Stewart*, 3 Maule & Selw. 201, 202; *per* MAISON, senator, in *Butts v. Collins*, 13 Wend. 156. The defendant, moreover, gets the right of set-off, which would be precluded by denying the plaintiff his election. *Per* HEATH, J., in *Lightly v. Clouston*, 1 Taunt. 114, 115. Nor would the defendant be likely to suffer embarrassment by the form of pleading. *Per* Lord MANSFIELD, in *Lindon v.*

*Hooper*, 1 Cowp. 414, 419. And clearly he could not be said to incur any hazard from a second action in tort for the same matter. See 1 Phil. Ev. (7th ed.) 333; *Rice v. King*, 7 Johns. 20; *McLean v. Hugaron*, 18 id. 184."

And in his remarks upon the second case (5 Hill, 584), he says that "the observations of the judges in *Young v. Marshall*, 8 Bing. 43 (21 E. C. L. 215), are worthy of attention as illustrating the principle on which the English doctrine rests. The action was for money had and received, and was brought by the assignee of a bankrupt against the sheriff on the ground that he had wrongfully sold goods belonging to the plaintiff on a *fi. fa.*; and it was objected that the action should have been trover, especially as the money had been paid over to the execution creditor before suit commenced. The court, however, overruled the objection, holding that the plaintiff *might*, but was not *bound*, to go for the tort. TINDAL, C. J., there stated the rule to be that '*no party is bound to sue in tort, where, by converting the action into an action on contract, he does not prejudice the defendant*'; and, generally speaking, it is more favorable to the defendant that he should be sued in contract, because that form of action *lets in a set-off*, and enables him to pay money into court.' BOSANQUET, J., denied that the plaintiff who brings *assumpsit*, in such case, thereby affirms the acts of the sheriff; '*he merely waives his claim to damages for a wrong, and seeks to recover only the proceeds of a sale.*'"

And still another most material advantage which the wrong-doer derives from the waiver of the tort and suit in contract, in this State, is freedom from arrest and imprisonment, to which he would otherwise be liable and might be subjected.

We conclude, therefore, that the doctrine of the authorities above quoted, and for which Mr. Hill contends, is the better one, and must accordingly hold that the justice was in error when he excluded the evidence offered by the defendant in support of the item in his counter-claim against the plaintiff for the pasturage of the plaintiff's cattle.

The judgment of the Circuit Court must be reversed, and the cause remanded with directions to that court to reverse the judgment of the justice.

It is so ordered.

*Judgment affirmed.*



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*Product of mortgaged property.*] Plants and shrubs, the growth of cuttings from plants and shrubs mortgaged, pass to the mortgagee by accession. *Bryant v. Pennel* (Mo.), 550.

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2. *Parties — in action against carrier for loss of goods.*] The purchaser of a chattel, being dissatisfied with it, reshipped it to the seller, and, afterward, the chattel not having come to the seller's hands, paid him for it. *Held*, that the right of action against the carrier for its loss was in the purchaser. *Ralph v. The Chicago & Northwestern R. R. Co.* (Wis.), 735.

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1. *Arrest for fraud in contracting debt — liability of principal for fraud of agent.*] A principal cannot be arrested under section 179 of the New York Code of Procedure, for frauds committed without his knowledge or authority by his agent in purchasing goods for him. *Hathaway v. Johnson* (N. Y.), 186.
2. —.] The New York Code of Procedure (section 179) authorizes an arrest "when the defendant has been guilty of a fraud in contracting the debt, or incurring the obligation upon which the action is brought." In an action to recover the purchase-price of goods sold by plaintiff to defendant, it was alleged that the sale was induced by fraudulent representations. It appeared that the purchase was made by the agent of defendant, who had no knowledge of the fraud. *Held*, that an order for the arrest of defendant was properly vacated. *Id.*

2. *Resulting trust.*] Plaintiff employed defendant, by parol, as agent to buy certain lands for him. Defendant bought the lands in his own name, gave his own notes for the purchase-money, and afterward claimed to hold the land as his own. *Held*, that plaintiff could not compel a conveyance of the lands to himself, and that there was no resulting trust which equity would enforce in plaintiff's favor. *Burden v. Sheridan* (Iowa), 505.

## ALIMONY.

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## ASSIGNMENT.

1. *Bona fide holder — assignee of non-negotiable chose in action.*] A bona fide purchaser of a chose in action not negotiable from one to whom the owner has assigned the apparent absolute ownership, upon the faith of such ownership, obtains a valid title as against such owner, although the assignee had not such title. *Moore v. Metropolitan National Bank* (N. Y.), 173.
2. —.] A was the owner of a certificate of indebtedness of the State of New York, which he transferred to P. with a written assignment. The transfer was induced by false representations, and the promises of B. were not fulfilled. B. transferred the certificate to the bank of M., which took it on the faith of the assignment. *Held*, that the bank was entitled to hold the certificate against A. *Bush v. Lathrop*, 22 N. Y. 535, overruled. B.

## ATTACHMENT.

1. *Of securities of foreign insurance company in hands of State treasurer.*] An Ohio insurance company, desiring to do business in Virginia, deposited, as required by statute, securities with the State treasurer, to be returned by

him when the company should cease to do business in that State, and should have satisfied its liabilities there. The company subsequently withdrew its business from Virginia and settled its liabilities there. *Held*, that it was entitled to receive back its securities, and that the securities in the hands of the treasurer were not liable to attachment at the suit of an Illinois creditor. *Rollo v. Andes Insurance Company* (Va.), 147.

3. *Garnishment of State officers.*] *It seems* that the officers of a State cannot be made liable by the process of garnishment for funds in their hands, clothed with a trust under the authority of law. *Id.*

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*See* CRIMINAL LAW, 748, and *note*, 751.

BAGGAGE.

*See* CARRIER.

BAILMENT.

*Negligence of bailee.*] Plaintiffs stored certain carriages in defendants' barn and paid storage. The carriages were injured by the falling in of the roof of the barn overloaded with snow. *Held*, that defendants were bound to furnish a building which was reasonably safe for such storage, and were liable if it proved to be unsafe, unless the defect was one which they did not know of, and could not have discovered by the use of ordinary care. *Moulton & Remington v. Phillips & Sheldon* (R. I.), 668.

BANKING.

1. *Certified check — alteration after certification — when bank not estopped by payment.*] A bank which pays a check which it has certified, but which was altered by raising the amount after certification, is not estopped from recovering back the money paid. It is bound only as to the signature of the drawer and its own certification. *National Bank of Commerce v. National Mechanics' Banking Association* (N. Y.), 333, and *note*, 337.
2. —.] G. obtained from V. & Co. a check, dated February 15, on plaintiff's bank for \$56.75, which the bank certified. G. then altered the amount of the check by raising it to \$15,000, and altered the date, making it February 16. He deposited it with defendant's bank on the same day with other deposits, amounting in all to \$20,000. Afterward, on the same day, he drew from defendant's bank all his deposits except about \$3,600. On the 17th of February the check was passed through the clearing-house to plaintiff's bank, where it was charged to V. & Co.'s account. Seven days afterward the account of V. & Co. was written up, and on March 1 they discovered the alteration and notified plaintiff's bank, whose officers immediately notified defendant. *Held*, that plaintiff was entitled to recover back the amount of the check from defendant, less the original amount plaintiff not being estopped by payment of the check, and defendant's loss not being the consequence of plaintiff's mistake. *Id.*

## BANKRUPTCY.

1. *Mortgage of personal property, how affected by.*] A mortgage on personal property to secure a loan was given in September, and in December the mortgagor filed his petition in bankruptcy. When the mortgage became due the mortgagee took possession of the property. In an action of replevin brought by the assignee in bankruptcy, *held*, (1) that the assignee took only the equity of redemption, by virtue of the bankruptcy proceedings, and that the mortgagee had the right to take possession of the property; (2) that the mortgagee could hold the property although he knew, at the date of the mortgage, that the mortgagor was insolvent, there being no other evidence that he had reasonable cause to believe that the mortgagor intended to defraud the bankrupt act. *Bentley v. Wells* (Ill.), 58.
2. *Effect of proving debt.*] The holder of a note, the makers of which have become bankrupt, is not estopped by proving the note as an unsecured debt in bankruptcy, from recovering the amount thereof from an accommodation indorser who holds a mortgage from the makers as security. *Merchants' National Bank v. Comstock* (N. Y.), 168.
3. *Jurisdiction of State court over actions by assignees.*] In the absence of any thing limiting the jurisdiction of a State court, it has power to entertain an action by an assignee in bankruptcy, to determine rights to property claimed by him, or to recover the estate of the bankrupt; and the provisions of the bankrupt act conferring jurisdiction in such actions upon the Federal courts, and declaring certain conveyances fraudulent which were not so under the State laws, do not exclude the jurisdiction of the State courts. *Cook v. Whipple* (N. Y.), 202.

## BILLS AND NOTES.

*See* NEGOTIABLE INSTRUMENTS.

## BLANK.

*Right of agent to fill.*] *See* BOND, 153; DEED, 439.

## BONA FIDE HOLDER.

*See* ASSIGNMENT, 73; NEGOTIABLE INSTRUMENTS, 168, 202.

## BOND.

1. *Performance of condition rendered impossible.*] A and B chartered a vessel and gave a bond, with C as surety, conditioned for her return at a certain time in good order. The vessel was destroyed in a gale by the "act of God." *Held*, that the obligors were not released from liability on the bond. *Steele v. Buck* (Ill.), 60.
2. *Filing in blank—liability of obligor.*] A bond was signed by A and B, and left in B's hands to raise money on. The understanding was that the money should be obtained of C, but B was not forbidden to get it of any one else, and a blank was left for the obligee. B got the money of D, and inserted his name in the blank. *Held*, that A was not liable to D on the bond. *Preston v. Hull* (Va.), 153. *See* DEED, 439.



3. *Execution by surety on condition that other sureties shall execute.*] Defendant signed a bond as surety on condition that the principal would also procure the signature of L. thereto as surety. L.'s signature was not obtained, but his name was forged to the bond. In a suit on the bond by the obligee, *held*, that the bond was void as to defendant. *Linn County v. Purrie (Mo.)*, 369.

## BREACH OF PROMISE.

*See* MARRIAGE, 111.

## BRIDGE.

*See* HIGHWAY, 339.

## CARRIER.

## I. OF GOODS.

1. *Express company — limitation of liability.*] Goods to the value of over \$400 were shipped by express, the bill of lading given by company stipulating that it should not be liable in case of loss beyond \$50. The goods were lost; and in an action to recover therefor, the company claimed that it was liable only to the extent of \$50. *Held*, that the measure of liability was the value of the goods. Such a limitation in a bill of lading does not excuse the carrier from the exercise of ordinary care, even when assented to by the shipper; and where the goods fail to arrive at their destination and the carrier does not show the manner of their loss, the presumption arises of want of ordinary care. *Adams Express Company v. Stettinors (Ill.)*, 57, and note, 60.
2. *Assent of shipper to limitation.*] The assent of a shipper to the limitations in a bill of lading is not necessarily to be presumed from the acceptance of the bill. *Id.*
3. *Goods sent "C. O. D." — Evidence to explain custom.*] Plaintiffs delivered goods to defendant's express company, consigned to "A. King, Clifton House, Windsor, N. S., C. O. D., \$375. From Turner's Express, Boston, Mass." The receipt given to plaintiffs exempted defendant's company from liability beyond its route. Defendant's route terminated at Boston, and there connected with Turner's Express, which transported goods from Boston to Windsor. In an action by plaintiffs against defendant for an alleged breach of the contract of transportation, *held*, (1) that parol evidence was admissible to explain the meaning of the letters "C. O. D.," but not the meaning of the remaining words; and (2) that it was inadmissible to show that it was the custom and usage among connecting express companies transporting goods marked "C. O. D." to transfer the goods with the bill to the succeeding line, and await return of proceeds. The direction was plain to collect \$375 from Turner's Express. *Collender v. Dinamore (N. Y.)*, 224.
4. *Liability for goods shipped to a point beyond the line.*] The acceptance by a railroad company of goods marked to a designation beyond the terminus of its road creates a *prima facie* liability to transport to and deliver the goods at that point, which, however, may be modified by proof of a differ

- ent usage known to the shipper at the time of making the consignment. *Mulligan v. Illinois Central R. R. Co.* (Iowa), 514.
5. *Special agreement.*] While the law imposes upon common carriers the duty of carrying all goods offered to them in the usual course of business, it does not impose upon them the duty of transporting goods beyond the termini of their respective routes, and they may, therefore, by special agreement, contained in a bill of lading or receipt, lawfully stipulate that they shall not be liable beyond such point. *Id.*
  6. *Shipper presumed to know contents of receipt.*] By the shipper accepting and acting upon such bill of lading, his knowledge of its stipulations will, in the absence of fraud or mistake, be conclusively presumed, and he will be bound thereby. He will not be permitted to show that he was ignorant of its contents. *Id.*
  7. *Delivery to wrong person.*] A B, representing himself as C D of P., bought goods of the plaintiff; the goods were marked for C D and delivered to the defendants, common carriers, who carried them to P. A B, who was known to the defendants by his real name, applied for them as the property of C D, and the defendants delivered them to him on his receipt, but without his producing a bill of lading which the defendants had given to the plaintiff, promising to deliver the goods to C D or order. There was no C D in P. *Held*, that the defendants were not liable to the plaintiff for delivering the goods to A B. *Dunbar v. Boston & Providence Railroad Corporation* (Mass.), 576.
  8. *Railroad company—liability as carrier of animals.*] Plaintiff, not being permitted to take his dog with him in defendant's passenger car, delivered it to the baggage-master of the train and paid him for its transportation. By the defendant's regulations, which were posted at various stations, "live animals" were "allowed as baggagemen's perquisites," but plaintiff had no special notice of this regulation. The dog was lost through the baggage-man's negligence. *Held*, that defendant was liable for the value of the dog. *Caniling v. The Hannibal, etc., R. R. Co.* (Mo.), 476.

## II. OF PASSENGERS.

9. *Duty to protect passengers from violence of fellow-passenger.*] A street car conductor is not bound to eject a passenger who addresses insulting remarks to his fellow-passengers, although he is intoxicated, provided he remains quiet and inoffensive after being admonished by the conductor; and the company is not responsible for the results of a sudden, unlooked for and violent attack committed by him on a fellow-passenger. *Putnam v. Broadway, etc., R. R. Co.* (N. Y.), 190.
10. —.] P., accompanied by two ladies, was riding in a street car, when F., who was intoxicated, got upon the car and made insulting remarks and signs to the ladies. The attention of the conductor was called to this, and he told F. to be quiet. F. then made threats of violence against P., but in a voice so low that the conductor did not hear. F. then went out upon the front platform and remained quiet. When the car stopped to allow P. and the ladies to alight, F. seized the car hook, ran to the back platform and struck P. blows on the head from which he subsequently died. *Held*, that the railroad company was not liable. *Id.*

- 11 *Liability for passengers' baggage — damages.*] In a suit against a carrier of passengers upon a steamboat for the loss of baggage, the plaintiff claimed for the loss of a set of dentist's instruments, and special damages in the loss of the profits and earnings which he might have made if the instruments had not been lost. *Held*, upon demurrer, that such special damages could not be recovered, but only such damages as were contemplated or might reasonably be supposed to have entered into the contemplation of the parties to the contract of carriage. *Brook v. Gale* (Fla., 356, and note, 363).
12. *What constitutes baggage is a question for the jury.*] It is a question for the jury to determine what articles of property, as to quantity, quality and value, contained in a passenger's trunk or valise, may be deemed baggage (subject to the power of the court to correct any abuse); and it is improper for the judge to designate by name what articles may be included in the term *baggage* of a traveler. *Id.*
13. *Construction of act of congress of February 28, 1871.*] The goods contained in the trunk, etc., of an ordinary passenger, traveling upon a steamboat, are not the goods of a "shipper" of freight or baggage within the meaning of the 69th section of an act of congress, entitled "An act to provide for the better security of life," etc., approved February 28, 1871. *Id.*
14. *What is baggage.*] Plaintiff took passage on defendant's steamboat, and was assigned a state-room. He asked for a key to the room, that he might place his baggage therein, and was informed that they gave no keys. He thereupon went to the room and deposited his hand baggage, informing the saloon boys of the fact, and asking if it would be safe. The baggage was stolen. There was a baggageman on the boat, whose duty it was to receive and check baggage, which plaintiff knew. *Held*, that the defendant was not liable for the baggage, but *semble* that he would have been had the state-room been locked. *Gleason v. Goodrich Transportation Co.* (Wis.), 716.
15. —.] A price-book used by a commercial traveler in his daily business, *held*, baggage within the rule of a carrier's liability. *Id.*
16. *Right of passengers to seat before paying fare.*] Plaintiff bought a ticket on defendant's road from W. to B. Not being able to obtain a seat in the car, he refused to surrender the ticket, and was ordered to leave train on its arrival at F. At F. he obtained a seat and tendered his fare from there to B., but refused to either surrender his ticket or to pay the fare from W. The conductor ejected him. In an action for damages based upon the contract entered into at W., *held*, that under the contract plaintiff could not maintain the action. *Davis v. The Kansas City, etc., R. R. Co.* (Mo.), 457.
17. —.] *It seems* that a passenger on a railroad train who exhibits his ticket and demands a seat has a right to have that demand complied with before he can be required to surrender his ticket. *Id.*

*Parties in action against for loss of goods.*] See ACTION, 725.

*Injury to person riding on a freight train.*] See PASSENGER, 735.

## CHATTEL MORTGAGE.

*How affected by bankruptcy of mortgagor.*] *See* BANKRUPTCY, 52.

## CHECK.

*Certified, alteration of.*] *See* BANKING, 282, and *note*, 287.

## COMMON CARRIER.

*See* CARRIER.

## CONCEALED WEAPONS.

*Validity of statutes prohibiting the carrying of.*] *See* CONSTITUTIONAL LAW 274, and *note*, 280.

## CONSIDERATION.

*See* NEGOTIABLE INSTRUMENT, 109; PROMISE, 609.

## CONSTITUTIONAL LAW.

1. *Municipal aid to railroads.*] An act of the legislature authorizing towns to appropriate money, as a donation, to aid in the construction of a railroad, is constitutional. *Chicago, Danville, etc., R. R. Co. v. Smith* (Ill.), 99.
2. *License to sell goods by sample* — “resident merchant.”] A State statute required a license to be obtained by every person selling goods by sample who was not a “resident merchant.” *Held*, that as a man may be a resident citizen and not a resident merchant, and the reverse, there was no discrimination in favor of citizens of the State, and therefore the statute was not unconstitutional. Such statute is not a regulation of commerce between the States. *Speer v. The Commonwealth* (Va.), 164.
3. *Impairing obligation of a contract* — *modifying remedy.*] A statute provided that “whenever final judgment shall be rendered in any court of record of this State, said judgment shall become a lien on all the real estate of the judgment debtor.” *Held*, (1) that, under this statute, judgments rendered before its passage become liens from the time they were rendered, and (2) that the act so construed was constitutional. *Moore v. Letchford* (Tex.), 363.
4. *Right to bear arms.*] A State statute regulating and in certain cases prohibiting the carrying of pistols, dirks, and certain other deadly weapons, is not repugnant to the second amendment to the constitution of the United States, which provides that “a well-regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed;” nor is the act in violation of the thirteenth section of the first article of the constitution of this State, which provides that “every person shall have the right to keep and bear arms in the lawful defense of himself or the State, under such regulations as the legislature may prescribe.” *English v. State* (Tex.), 274, and *note*, 280.
5. —.] The “arms” referred to in the second amendment of the United States constitution are the arms of a militiaman or soldier, and they do not comprise dirks, bowie knives, etc., regulated by the legislature in the act of April 12, 1871. *Ib.*

6. —.] The powers of government are intended to operate upon the civil conduct of the citizen; and whatever conduct offends against public morals or public decency comes within the range of legislative authority. *Ib.*

*See* STATUTE.

CONTRACT.

1. *Impairing obligation of, by judicial decisions.*] A party to a contract has a right to rely on the decision of the highest judicial tribunal in the land as to the law governing his contract. *Harris v. Jee* (N. Y.), 235, and *note*, 238.
2. *For advertisement in Sunday paper — violation of law not to be presumed.*] Plaintiffs contracted to publish an advertisement in the weekly (Sunday) edition of their paper for a year. *Held*, that as it did not appear, and was not to be presumed, that the contract contemplated any labor to be done on Sunday, it must be held to be valid. *Sheffield v. Balmer* (Mo.), 490.

*Evidence of custom or usage to explain.*] *See* EVIDENCE, 224.

*Impairing obligation of.*] *See* CONSTITUTIONAL LAW, 363.

*Of infant for services.*] *See* INFANT, 580.

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*By wife.*] *See* HUSBAND AND WIFE, 628.

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*See* PARDON, 496.

COUNTER-CLAIM.

*Right to waive a tort and sue in assumpsit.*] A laid down B's fence and turned his cattle in upon B's pasture land. *Held*, that B might waive the tort and set up a claim for pasturage of the cattle as a counter-claim in an action of contract brought against him by A. *Norden v. Jones* (Wis.), 782.

*Discontinuance of action after answer of.*] *See* ACTION, 755.

COVENANT.

1. *Against incumbrances — breach of — rights of remote grantees.*] Defendant conveyed land to F. by deed containing a covenant "that the said lands are free from all incumbrances." At the time of the conveyance there were taxes unpaid on the land. F. conveyed the land to plaintiff, who paid the taxes and brought an action on the covenant against defendant. *Held*, that although the covenant was nominally broken on the delivery of the deed by defendant to F., yet as F. did not remove the incumbrance nor suffer any damage therefrom, the right of action for the breach of the covenant passed to and vested in plaintiff. The case is not within the rule prohibiting assignments of *chooses in action*. *Richard v. Bent* (Ill.), 1.
2. *Action of, against married women.*] When a wife joins with her husband in a lease of her lands, with covenants of quiet enjoyment, her heirs and devisees are not answerable after her death (as she would not be while living, being a married woman, and therefore not bound by such covenants) for any breach thereof. *Foster v. Wilcox* (R. I.), 698.

## CRIMINAL CONVERSATION.

*Evidence in action for.*] In an action for criminal conversation the defendant may prove, in mitigation of damages, the plaintiff's criminal connection with other women at any time after marriage and before trial. *Shattuck v. Hammond* (Vt.), 631.

## CRIMINAL LAW.

1. *Silence of person accused as evidence of guilt.*] When declarations are made in the presence and hearing of an accused person of matters within his personal knowledge, and affecting his guilt, and he remains silent when it would be proper for him to speak, this circumstance is presumptive evidence, however slight, of guilt; and it is no objection to the admission of such circumstance in evidence that the accused was under arrest. *Kelley v. People* (N. Y.), 343.
2. —.] Defendants were arrested on charge of stealing money from the person, and the prosecutor was taken to their place of custody to identify them. They were identified, and the prosecutor, in their presence and hearing, described the money, and the defendants made no reply. On searching one of the defendants, two parcels of money were found; one answering the prosecutor's description. The other parcel defendant asked to be kept separate, saying it was "bar money." *Held*, evidence of defendant's acquiescence in the truth of prosecutor's statement. *Id.*
3. *Conspiracy — evidence of.*] A conspiracy may be proved by circumstantial evidence; and parties performing disconnected overt acts, all contributing to the same result and the consummation of the same offense, may, by the circumstances and their general connection or otherwise, be satisfactorily shown to be conspirators and confederates in the commission of the offense. *Id.*
4. *Murder — resisting arrest — killing the wrong person.*] When a party resisting arrest attempts to kill the officer, while the latter in the line of his duty is making the arrest, but by accident kills a third person, the killing is murder. *Angell v. The State* (Tex.), 880.
5. —, *corpus delicti — confession without proof of.*] A conviction of murder is not warranted when there is no proof of the *corpus delicti* but the uncorroborated extra-judicial confession of the accused. *State v. German* (Mo.), 481, and *note*, 496.
6. —.] Defendant was indicted for the murder of C. who had disappeared some months before. No remains of C. were found, nor was there evidence of his death, other than a confession by the defendant that he killed C., alleged to have been made to the officer who arrested him. At the trial defendant pleaded not guilty. *Held*, that evidence of the confession was not admissible. *Id.*
7. *When a detective is not an accomplice.*] One who enters into communication with criminals and assists them in perpetrating a crime, without any felonious intent, but solely for the purpose of discovering and making known their crimes and disclosing them for the benefit of the public, is not to be regarded as an accomplice, even though he be not an officer of the law, or charged with any public duty to detect offenders. *State v. McKee* (Iowa), 530.

6. *Once in jeopardy—plea of, upon new trial.*] Defendant was indicted for murder, was convicted of murder in the second degree, and was afterward granted a new trial upon his own application. *Held*, that on the second trial he could not be convicted of a higher crime than murder in the second degree. *State v. Belden* (Wis.), 748, and *note*, 751.

CUSTOM.

*When evidence of, admissible to explain contract.*] See EVIDENCE, 224.

DAMAGE.

1. *Measure of—on taking of land by eminent domain.*] The water commissioners of the city of Providence determined to make a public improvement, to wit, a reservoir, and took certain land for that purpose, but none belonging to the present complainants. After the location of said improvement they decided to take more land, namely, that of the complainants' now in question. *Held*, that the value of complainants' said land was to be estimated as it was at the time it was condemned, and not at the time of the location of the improvement. *Stafford v. City of Providence* (R. I.), 710.
2. *On taking land for railroad.*] Plaintiff was notified by defendants that part of certain lands bought by him to erect buildings on would be taken by defendants for their railroad, and proceedings were commenced therefor; plaintiff notwithstanding erected his buildings, and defendants afterward took the land. *Held*, that the damage for the taking of the land was to be estimated as of the day when the defendants acquired the right to the property, and that plaintiff was entitled to damages according to the value of the lands as improved. *Drier v. The Western Union R. R. Co.* (Wis.), 726.
3. *Evidence.*] Several lots were used in connection with a mill property. One of the lots was taken for the use of a railroad. *Held*, that evidence that the business of the mill would be injured by the taking was admissible on the question of damages. *Id.*

*Measure of, for error in message.*] See TELEGRAPH, 38.

*For failure to deliver message.*] See TELEGRAPH, 776.

DEAD BODIES.

*Property in.*] See PROPERTY, 667.

DEED.

*Executed without grantee being named—parol authority to fill blank.*] A deed was executed with a blank left therein for the name of the grantee, and in that condition placed in the hands of an agent, with verbal authority to fill the blank. The agent did fill the blank with the name of a grantee in the absence of the grantor, and delivered the deed. *Held*, that the deed was valid. *Field v. Stagg* (Mo.), and *note*, 429.

*Right of agent to fill blank in.*] See BOND, 153.

DELIVERY.

*By common carrier to wrong person.*] See CARRIER, 576.

## DISCONTINUANCE.

*Of action after answer.]* See ACTION, 755.

## DIVORCE.

See ALIMONY, 535.

## DOG.

*Liability for killing, while trespassing.]* See TRESPASS, 35.

## DURESS.

*Threat of prosecution.]* Plaintiff paid money to defendant under threat of criminal prosecution, but there was no threat of immediate imprisonment. *Held*, that he could not recover the money back on the ground of duress. *Harmon v. Harmon* (Me.), 556.

## EASEMENT.

*Percolating waters.]* Plaintiff granted to defendant "the right of way over and through his land for all purposes connected with the construction, use and occupation of its railroad." *Held*, that defendant had the right to dig a well upon the land covered by the deed, and to use the water supplied by percolation for railway purposes, though such well materially injured a valuable spring on plaintiff's adjacent land. *Hougen v. The Milwaukee & St. Paul R. R. Co.* (Iowa), 502.

## EMINENT DOMAIN.

*Measure of damages on taking of land by.]* See DAMAGES, 710, 726.

## ESTOPPEL.

*When owner estopped from claiming his property.]* Two things must concur to create an estoppel by which an owner may be deprived of his property, by the act of a third person, without his assent: (1) The owner must clothe the person assuming to dispose of the property with the apparent title to or authority to dispose of it; and (2) the person alleging the estoppel must have acted and parted with value upon the faith of such apparent ownership or authority, so that he will be the loser if the appearances to which he trusted are not real. *Bernard v. Campbell* (N. Y.), 269.

*When bank not estopped by payment of altered check.]* See BANKING, 293; NEGOTIABLE INSTRUMENT, 106, 123.

## EVICTION.

*What constitutes.]* See LANDLORD AND TENANT, 124.

## EVIDENCE.

1. *Of usage and custom, when admissible.]* Words or forms of expression, in a written instrument, not in universal use, but local or technical words, or phrases having two meanings, one common and universal the other peculiar, technical or local, and characters, marks and technical terms used in a particular business, may be explained by parol evidence. *Collender v. Dinmore* (N. Y.), 224.



2. —.] Custom and usage can be resorted to for the purpose of ascertaining and explaining the intention of the parties to a contract when it cannot be ascertained without parol evidence, but never for the purpose of contradicting or qualifying express and certain provisions. *Id.*
  3. *Parol evidence contradicting an instrument.*] In a contention between a party to an instrument and a stranger to it, either may give parol evidence differing from the contents of the instrument. *McMaster v. Ins. Co. of N. A.* (N. Y.), 289.
  4. *Of expert as to death by suicide.*] On the trial of an action on a policy of life insurance where the assured had committed suicide, a medical witness was asked, "Assuming that a person had that form of insanity which you denominate melancholia, and had committed suicide, would you attribute that suicide to the disease?" *Held*, that the question was improper, as calling for no information, peculiarly within the knowledge of an expert, but for an inference which the jury were capable of drawing, if justified by the facts, without being influenced by the opinion of the witness. *Van Zant v. Mutual Benefit Life Ins. Co.* (N. Y.), 215.
  5. *Of experts as to value of dogs.*] Experts may be allowed to give their opinions as to the value of dogs, the opinions being based either on actual sales or their general observations and experience. *Cantling v. Hannibal, etc., R. R. Co.* (Mo.), 476.
  6. *Of handwriting.*] A party to an action is not entitled to write his signature in the presence of the jury for the purpose of being compared with a signature purporting to be his, the genuineness of which he denies. *King v. Donahue* (Mass.), 589.
- Of a partnership.*] See PARTNERSHIP, 25.
- Parol, of republication of will.*] See WILL, 584.
- Parol, of misdescription in will.*] See WILL, 549.
- In action for crim. con.*] See CRIMINAL CONVERSATION, 681.
- Of damage on taking land for railroad.*] See DAMAGE, 726.

#### EXECUTION.

*Exemption from — cumulative exemption.*] Under a statute exempting certain personal property from execution, the debtor was entitled to a horse worth \$60; under a subsequent statute in addition to the property already exempt, a horse worth \$100 could be retained. *Held*, that under the two statutes a horse worth \$160 was exempt. *Good v. Fogg* (Ill.), 71.

#### EXEMPTION.

*From execution.*] See EXECUTION, 71.

#### EXPERTS.

See EVIDENCE, 215, 476.

#### EXPRESS COMPANY.

See CARRIER.

## FIRE.

*Communicated by locomotive.] See NEGLIGENCE, 12, 449.*

## FORGERY.

*Ratification of.] See NEGOTIABLE INSTRUMENTS, 106, 122.*

*Alteration of certified check.] See BANKING, 263.*

## FRAUD.

*Liability of principal to arrest for fraud of agent.] See AGENCY, 123.*

*See STATUTE OF FRAUDS.*

## FRAUDULENT SALE.

*When owner of property fraudulently sold, estopped from claiming.] See ESTOPPEL, 269.*

## GIFT.

1. *Of debt, when valid.] A valid gift of a debt due the donor from the donee may be made by the donor by balancing the books of account and delivering a receipt in full to the donee. Gray v. Barton (N. Y.), 181.*

2. *—.] Plaintiff had an account against defendant of over \$300, and with the intention of making a gift thereof received from defendant \$1 and balanced the account by the entry "Gift to balance accounts." He also gave defendant a receipt in full. Held, that this was a valid gift, and plaintiff could not afterward maintain an action to recover the balance not paid. Ib.*

## GARNISHMENT.

*See ATTACHMENT, 147.*

## HANDWRITING.

*Evidence of.] See EVIDENCE, 589.*

## HIGHWAY.

1. *Bridge over stream — compensation to riparian owner.] A State legislature has power to authorize the erection of a toll-bridge at the crossing of a stream by a public highway, without compensation to the riparian owners; and it is immaterial that the riparian owners are operating a ferry at the crossing, the value of which will be impaired by the bridge. Jones v. Keith (Tex.), 382.*

2. *—.] A bridge spanning a stream at the crossing of a highway, and within the limits of a highway, is a part of the highway, and is not such a new servitude on the lands as to enable the riparian proprietors to compensation. Ib.*

3. *Defect in — injury to traveler while attempting to pass another traveler.] Plaintiff was injured while attempting to pass a team going in the same direction upon a highway which the defendant was required by statute to keep in repair. On the trial the court charged that it was the duty of the town to keep the highway in good and sufficient repair for the meeting*

and passing of teams, such as it might reasonably be expected the highway would be used for, and to keep such places as would naturally invite travelers to pass over them, for the purpose of passing other travelers, reasonably safe for that purpose; that if the highway at the place of the accident was insufficient in respect to the width of the traveled track, and the situation of the road was such as to lead the plaintiff to think that it was a safe place to pass, and if he used common care and prudence in undertaking to pass, and was injured by means of the insufficiency of the highway, he was entitled to recover. *Held, correct. Mochler v. Town of Shaftsbury (Vt.), 634.*

4. *Duty of town to fence. Injury from defect.*] A town is not ordinarily bound to fence its roads, and where a highway connected with a private way, and there was a defect in the private way some fifty to one hundred feet from the junction of the two ways, it was *held*, that the town was not liable for an accident happening to one who drove off by mistake upon the private way and was injured by reason of such defect, although there was no fence or other mark to show the deviation of the private way. *Chapman v. Cook (R. I.), 636.*

See MUNICIPAL CORPORATION.

#### HUSBAND AND WIFE.

1. *Liability of husband for torts of wife.*] An action will not lie against husband and wife jointly for those torts of the wife which are founded on her contract. *Woodward v. Barnes (Vt.), 626.*
2. *Torts of wife—conversion of property.*] A husband is liable jointly with the wife, at the suit of an administrator, for the wife's tort in wrongfully disposing of the effects of the intestate, whether before or after letters of administration were granted. *Shaw v. Hallihan (Vt.), 626.*
3. *Witness to will.*] A wife is not a competent witness to her husband's will. *Pease v. Altis (Mass.), 591.*

*Action of covenant against wife.*] See COVENANT, 696

See MARRIED WOMAN.

#### INCUMBRANCE.

*Right of action for breach of covenant against.*] See COVENANT.

#### INFANT.

*Contract of, for service.*] An infant who has contracted with manufacturers to work for them for three years can avoid the contract, and sue on a *quantum meruit*. *Gaffney v. Hayden (Mass.), 580.*

#### INSANITY.

*Suicide from.*] See INSURANCE, 215.

#### INSURANCE.

##### FIRE INSURANCE.

1. *Interest of insured.*] A policy of fire insurance provided that "if the interest in the property to be insured be \* \* \* not absolute, it must be so

stated in the policy, otherwise the same shall be void." In reply to the question, "What is the title, and whether incumbered by mortgage or otherwise \* \* \*" the answer was "Fee simple." The policy was payable to R., who, at the date thereof, had a mortgage on the property. The existence of the mortgage was known to the agent and to the vice-president of the insurance company. *Held*, that there was no concealment of the true character of the title, and that the policy was valid. *Home Mutual Fire Ins. Co. v. Garfield* (Ill.), 37.

2. *Rebuilding by insurers.*] The charter of a fire insurance company provided that the directors should pay all losses within three months unless they should judge it proper within that time to rebuild or repair. In conformity with these provisions, the insured was notified that the company elected to rebuild the building insured, which had been destroyed by fire. *Held*, that it was error to charge the jury that "the company was bound to rebuild the building destroyed, cost what it may." If the company neglected within a reasonable time to carry out its notice to rebuild, the insured might disregard it, sue upon the policy and recover the amount of the policy and interest, and the rental value of the ground during the time of the delay. *Ib.*
3. *Undisclosed prior insurance — effect of statement in proofs of loss.*] Proofs of loss do not form a part of the contract of insurance; and the assured is not estopped from showing that a statement in the proofs of loss was a mistake so far as it states facts going to annul the policy. *McMaster v. Ins. Co. of N. A.* (N. Y.), 389.
4. —.] A policy of fire insurance contained a proviso that it should be void in case the assured had a prior insurance upon the property of which the company was not notified, and to which it did not consent. The property having been destroyed, the proofs of loss were sent in, containing a statement that there was other insurance on the property at the date of the policy. *Held*, that the assured was not estopped from showing that the statement was a mistake, and that there was no other insurance on the same property. *Ib.*
5. *Mistake — reformation of policy.*] A mistake, in order to authorize a court of equity to reform a contract of insurance, must be one made by both parties, or it must be a mistake of one party in connection with the fraud of the other, in taking advantage of the mistake. *Bryce v. Lorillard Fire Ins. Co.* (N. Y.), 249.
6. *Description of location of property — Warranty.*] Defendant insured merchandise described in the application and policy as "contained in letter C, Patterson storea." These stores constituted a warehouse divided into sections by fire-proof walls, and were designated by letters of alphabet. The merchandise was in fact in "letter A," at the date of the policy and of its destruction by fire. *Held*, that defendant was not liable in the policy, the description being a warranty of the particular location of the merchandise. *Ib.*
7. *Double insurance — liability of last insurer — rights of mortgagee. Insurable interest of assignee of mortgage.*] The mortgagee of premises assigned the mortgage to C., whose husband, acting as her agent, procured policies

- of insurance upon the mortgage interest from plaintiffs' agent. Within a few days plaintiffs instructed their agent to cancel the policies, whereupon the agent applied to defendant for an insurance covering the same risk. Defendant issued a policy to C. and delivered it to plaintiffs' agent for C. The property was soon destroyed by fire, and on the following day C.'s husband paid the premium. C. made out proofs of loss and sent them to plaintiffs; she subsequently assigned to plaintiffs the claim against defendant on the policy. *Held*, (1) that plaintiffs could not recover against defendant on the ground of re-insurance; (2) but that they could recover as the assignees of C., who obtained a good title to the policy through the acts of her husband and plaintiffs' agent; (3) that C.'s insurable interest was not simply the amount which she had actually paid the mortgagees under the contract of assignment, but the whole amount secured and unpaid upon the mortgage. *Excelsior Fire Ins. Co. v. Royal Ins. Co.* (N. Y.), 271.
8. *Mortgagees need not exhaust remedy on mortgage.*] A mortgagee who has insured his mortgage interest at his own expense and for his own indemnity, without any agreement with the mortgagor, need not first exhaust his remedy on his mortgage before he calls upon the insurer to make good damage to the property by fire. *Id.*
  9. *Waiver of forfeiture.*] Where a policy of fire insurance is forfeited by a change in the title of the insured property, and the agent of the insurers informs the person for whose benefit the policy was issued, that the policy will be allowed to stand, the insurers cannot, after a loss by fire, elect to declare the policy void. *Pratt v. New York Central Ins. Co.* (N. Y.), 304.
  10. —.] Plaintiff, who had a mortgage interest in property, applied to defendant's agent for an insurance thereon. The form of the policy was left to the judgment of the agent, who made out a policy to the mortgagors, payable to plaintiff in case of loss. The policy contained a condition that a change in the title of the property, without defendant's written consent, would avoid the policy. The mortgage was subsequently foreclosed and plaintiff became the purchaser. Plaintiff informed the agent of the change in title, and was told that the policy might stand. A loss by fire having occurred, *held*, that defendant was liable on the policy. *Id.*
  11. *Proof of loss.*] Where proofs of loss are prepared in conformity with the direction of an insurance company's agent and submitted to the company, which retains them for several days and then sends a general notice to the person claiming under the policy that the proofs are defective, without specifying in what particular, additional proofs need not be furnished. *Id.*
  12. *Condition of policy — limitation of time for bringing action.*] A policy of fire insurance contained a condition that "all claims under this policy are barred, unless prosecuted within one year from the date of the loss. *Held*, (1) that the condition was valid and binding; (2) that a presentation of the loss and a demand of payment were not such a prosecution of the claim as to satisfy the condition, but that an action must be brought within the time limited. *Merchants' Mutual Ins. Co. v. Laorois* (Tex.), 370.
  13. *Waiver of conditions in policy by acts of agent.*] A policy of fire insurance was conditioned to be void if there should be any other insurance on the

property without the assent of the company indorsed on the policy. *Held*, that this condition might be waived by the acts of the company's agent. *Hayward v. National Ins. Co. (Mo.)*, 400.

14. *Covenant for care of property — negligence of insured.*] An applicant for a policy of fire insurance covenanted to keep his stoves and pipes well secured. After the policy was issued the wife of the assured, intending to remove for the summer a stove, the pipe of which passed through the floor of an upper room and thence into the chimney, took down the pipe in the upper room and placed a bed over the hole in the floor; but did not remove the stove and pipe below. Afterward forgetting what she had done, she built a fire in the stove which set fire to the bed and burned the house. *Held*, that the assured could recover on the policy. *Mickey v. The Burlington Ins. Co. (Iowa)*, 494.
15. —.] Mere negligence on the part of the assured or his servants resulting in the destruction of the insured property will not defeat the policy; to have that effect the negligence must be gross and inexcusable. *Id.*

#### LIFE INSURANCE.

16. *Waiver.*] The receipt of an over-due premium by the agent of a life insurance company, and the acceptance thereof by the company when forwarded to them, is a waiver of the condition of forfeiture for non-payment of a premium when due. *Mutual Benefit Life Ins. Co. v. Robertson (Ill.)*, 8.
17. *Renewal — representations.*] A policy was issued on the life of a husband for the benefit of his wife, and a renewal was procured from year to year by payment of an annual premium. The last renewal was obtained during the absence of the husband, the wife telling the agent of the company, in response to inquiries about her husband, that she had received a letter from him, and that he was in his usual health. *Held*, that this statement being verbal, and not referred to in the policy, was a mere representation, and the evidence in the case showing that the statement was not material and did not induce the risk, the renewal was valid. *Id.*
18. *Death of assured "by his own hands." Insanity.*] A person whose life is insured under a policy containing a proviso that in case he should die "by his own hands" the policy should be void, and who takes his own life, must be insane to such a degree as to render him unconscious that the act he does will cause his death, or he must commit it under the influence of some insane impulse which he cannot resist, in order to take the case out of the proviso. *Van Zandt v. Mutual Benefit Life Ins. Co. (N. Y.)*, 215.
19. —.] In an action on a policy of life insurance, containing a proviso that in case the assured should die "by his own hands," the policy should be void, it appeared that the assured took his own life by shooting himself. The judge charged the jury that if the assured was incapable of determining whether the act which he did was right or wrong, the company was liable. *Held*, error. *Id.*
20. *Insurable interest.*] A woman engaged to be married to a man has an insurable interest in his life. *Chisholm v. National Capital Life Ins. Co. (Mo.)*, 414.

MARINE INSURANCE.

21. "Time" policy — warranty of seaworthiness.] A vessel lying in port was insured from April 1 to November 30. The vessel was to be employed in navigating certain inland waters, and sailed first on April 10. *Held*, that the policy being a "time" policy, there was no implied warranty that the vessel was seaworthy at the time of starting on the first voyage. *Merchants' Insurance Company v. Morrison* (Ill.), 98.
22. Mistake in policy as to vessel.] A mistake in the name of a vessel in a policy of marine insurance is no obstacle to a recovery, if in point of fact both parties had in view the same vessel, and the underwriter, when the policy was issued, knew the true name, or intended to insure the particular vessel lost; but when there is a mistake as to the vessel sought to be insured, and the policy is upon another vessel than that for which application was made, no contract exists, as the minds of the parties did not meet; and this is so, although the underwriter was put upon inquiry, and by the exercise of diligence and care could have prevented the mistake; negligence alone will not avoid the difficulty. *Hughes v. The Mercantile Mutual Ins. Co.* (N. Y.), 254.

*Declaration on policy.*] See PLEADING, 73.

*Attachment of securities deposited with State treasurer.*] See ATTACHMENT, 147.

INTEREST.

1. *Law of place.*] Where bonds, and a mortgage to secure payment thereof, are made in New York between parties resident there, and no provision is made for the payment of the bonds elsewhere, they are presumably to be paid in New York, and interest is to be computed according to the laws of that State, although the mortgage given to secure them is made upon real estate in Rhode Island. *Kavanaugh v. Day* (R. I.), 691.
2. —.] And where the interest is payable, not as interest, but as damages for the non-payment of the bonds at their maturity, the same rule applies, and interest is to be computed according to the laws of the place where default is made. *Id.*

See USURY, 180, 352.

JUDGMENT.

1. *By confession, for future advances.*] By section 382 of the New York Code of Procedure, it is provided that judgments by confession may be entered without action, either for money due or to become due. Judgments were confessed by C. to secure defendants for their notes and other commercial paper, which they were to advance to C. to be used in his business, and which were in fact so advanced and used. *Held*, that the judgments were valid. *Cook v. Whipple* (N. Y.), 202.
2. —, *verification.*] The verification of the statement to a judgment by confession was upon information and belief only, which was insufficient. In an action by the assignee in bankruptcy of the judgment debtor against the judgment creditor, to test the validity of the judgment, *held*, that the defendant was entitled to have the verification amended. *Id.*

8. *Recovery of, on contract — when no bar to action for breach of contract.*] Defendant contracted to do certain work for plaintiff, by a certain time, for a fixed price. He sued plaintiff for the price, and had judgment by default. *Held*, that such judgment was no bar to an action by plaintiff against defendant to recover damages for failing to complete the work within the time fixed. *Davenport v. Hubbard* (Vt.), 630.
4. —.] *Seem*, it would have been otherwise had the judgment been recovered upon *quantum meruit*. *Ib*.

## JUDICIAL SALE.

*Proceedings must be regular.*] Where the land of one person is transferred to another under an execution, it must appear from the officer's return that he has proceeded according to the statute, and, if it does not so appear, the defect cannot be supplied by evidence *alunde*. *Wilcox v. Emerson* (R. I.), 683.

## JURISDICTION.

*Of State court of suits by assignee in bankruptcy.*] See BANKRUPTCY, 203.

## JUROR.

*Qualification of.*] By statute, jurors are to be selected and put on the list from such persons as are assessed for personal property, or own a freehold estate in real property. P. owned a farm when he was put on the list, but was not assessed for personal property. Before the trial, he sold his farm, receiving a mortgage for part of the purchase-money; and at the time of the trial he was not a freeholder, and was not assessed for personal property. He was challenged. *Held*, that he was not a competent juror. The property qualification, when questioned by a challenge, must be that required to authorize the original selection of the individual as a juror. *Kelley v. People* (N. Y.), 842.

## JUSTIFICATION.

*In action against collection of taxes.*] See TAXATION, 572.

## LANDLORD AND TENANT.

1. *What constitutes eviction.*] In an action for rent, it appeared that the landlord had taken possession of a part of the demised premises. *Held*, that this was an act of trespass, or eviction, according to the intention with which it was done, and if the jury should find it to be an eviction, the tenant was released from the payment of rent accruing after the eviction. *Hayner v. Smith* (Ill.), 124.
2. *Tenancy at will — notice to quit.*] Defendant went into possession of plaintiff's premises, with plaintiff's consent, but without an agreement as to the time of holding, or as to paying rent, and continued in possession fourteen years. He built a barn on the premises and repaired the house, but refused, when applied to, to pay rent. *Held*, that defendant was not a tenant from year to year, and therefore not entitled to six months' notice to quit. *Rich v. Bolton* (Vt.), 615.



LAWYERS.

*Power of municipal corporation to tax.*] See TAXATION, 189.

LICENSE.

*Will not justify assault.*] See ARRAULT, 578.

*Of lawyers.*] See TAXATION, 189.

LIEN.

*On vessel under State law.*] See SHIP AND SHIPPING.

LIMITATION OF ACTION.

At the trial of an action to which the statute of limitations was a bar, unless the defendant had been away from the State between two or three years, a witness for the plaintiff testified that the defendant was away "two, three or four years, I could not exactly say how long." The defendant introduced no evidence as to the time of his absence. *Held*, that the jury were warranted in finding that the case was taken out of the statute of limitations. *Kennedy v. Shea* (Mass.), 584.

MALICIOUS PROSECUTION.

*Probable cause. Advice of counsel.*] Defendant caused an indictment to be found against plaintiff, after stating to counsel all the facts bearing on plaintiff's guilt which he knew or could by reasonable diligence ascertain, and acting in good faith on the advice given. *Held*, that defendant was not liable in an action for malicious prosecution. *Wicker v. Hotchkiss* (Ill.), 75.

MARITIME LAWS.

See SHIP AND SHIPPING.

MARRIAGE.

1. *Breach of promise of—proof of promise.*] In an action for breach of promise of marriage, the judge charged the jury: "In this suit the jury may infer a promise to marry to have been made by defendant, first, from the conduct of the parties; second, from the circumstances which usually attend an engagement to marry, as visiting, the understanding of friends and relatives, preparations for marriage, and the reception of defendant by the family of plaintiff as a suitor." *Held*, error. It does not follow that because a man is the suitor of a lady and visits her frequently, a marriage engagement exists. *Walmesley v. Robinson* (Ill.), 111.
2. *Evidence of promise to marry.*] In an action for breach of promise of marriage, *held*, that plaintiff's sister could not testify that plaintiff had told her in the absence of defendant about the engagement. *Id.*
3. *Promise of, when void.*] A promise of marriage made at a time when both parties were married and known to be so, by each other, *held* invalid. *Paddock v. Robinson* (Ill.), 112, and *note*, 118.
4. *Engagement to marry.*] A woman engaged to be married to a man has an insurable interest in his life. *Chisholm v. Nat. Life Ins. Co.* (Mo.), 414.

MARRIED WOMAN.

*Conveyance of real estate — when void.*] The statute of Illinois provided that it should be lawful for the husband and wife to execute a deed of her real estate. A wife, without the concurrence of her husband, executed a separate deed of trust of her real estate to secure payment of a promissory note given by herself and husband for his debt. *Held*, that the deed was void. It is only in the precise mode prescribed by statute that a married woman can make a valid conveyance of land. *Bressler v. Kent* (Ill.), 67.

*Action of covenant against.*] See COVENANT, 698.

MASTER AND SERVANT.

1. *Injury to servant through the negligence of co-servant.*] Plaintiff was employed by a railroad company as a laborer in their carpenter shop, and while returning home after his day's work was done, he had occasion to cross the company's tracks, when he was struck and injured by one of their engines. *Held*, that the company was liable for the negligence of the enginemen, the employment of those in charge of the engine and of plaintiff as laborer in the carpenter shop being dissimilar and separate. *Ryan v. Chicago & Northwestern R. Co.* (Ill.), 83.
2. *Liability of master to servant for negligence of co-servant — superintendent not co-servant.*] A superintendent who has entire control of any work, with power to employ and discharge workmen and to provide and remove material, is not a fellow-servant within the meaning of the rule that a master is not liable for injuries to a servant, caused by the negligence of a co-servant; and for the negligence of such superintendent, occasioning injury to an employee, the master is liable. *Brothers v. Cartter* (Mo.), 424.
3. *Action against corporation for negligence of co-servant — contributory negligence.*] One employed by a railroad corporation to drive a locomotive engine over its road may recover damages against the corporation for personal injuries caused by a defect in the engine, which was due to the neglect of the agents of the corporation charged with keeping the engine in proper repair, although the directors and superintendent had no reason to suspect negligence or incompetence on the part of such agents. *Ford v. Fitchburg R. R. Co.* (Mass.), 598.
4. —.] One employed by a railroad corporation to drive a locomotive engine over its road is not debarred from recovering damages against the corporation for injuries from an explosion caused by a defect in the boiler of the engine, by the fact that he was acting in intentional violation of the rules of the company, unless the accident was due, in whole or in part, to such violation; nor by the fact that such rules provided that the driver of an engine should be held responsible for the condition of his engine, must be sure that it was in good working order, and must immediately stop, draw his fire, station his signal men and procure assistance, whenever any defect was detected in an engine that would make it, in his judgment, unsafe to proceed; nor by the fact that he knew the engine was not in good working order, if he did not know and ought not to have known that it was unsafe. *Id.*

5. *Injuries to third person by servant's malicious acts.*] Defendant's engineman wantonly and maliciously sounded the locomotive whistle, so as to frighten the horses of plaintiff, whereby he was injured. *Held*, that defendant was liable. *Chicago, etc., R. R. Co. v. Dickson* (Ill.), 114.

*Relation of, between parent and child.*] See SEDUCTION, 584.

# MINES.

1. *Right of owner to work — reservation in deed.*] The reservation in a deed of land of the minerals which may be found therein implies the right to penetrate the surface for the minerals, and to use such means in mining and removing them as are necessary; but the means used must be necessary as distinguished from convenient or reasonable, and the surface owner is entitled to subjacent support for the soil in its natural state. *Martin v. Brewster Iron Mining Co.* (N. Y.), 322.
2. —.] In an action by the surface owner against the mine owner to restrain certain mining operations and to recover damages for alleged injuries to the surface owner, *held*, that defendant's right to maintain a certain tramway, to erect on the surface and use a barn, powder-house and blacksmith shop, to sink and use, in a certain way, a steam-engine, to blast in the mine in the night-time, or at any time so as to shake or injure the dwelling of plaintiff and disturb his enjoyment, to deposit ore or refuse on the surface, was to be tested by the necessity therefor, as incidental to the right to mine and remove. *Id.*
3. *Effect of non-user.*] The non-user of a mine reserved in a deed of land will not of itself extinguish the right of the mine owner. *Id.*

# MISTAKE.

*In policy of fire insurance.*] See INSURANCE, 249.

*In policy of marine insurance as to vessel.*] See INSURANCE, 254.

# MORTGAGE.

1. *Destruction of record — notice to purchaser.*] A mortgage bore an indorsement that it had been recorded; but the record book had been destroyed by fire. *Held*, that the mortgage was the highest evidence of the lien on the premises covered by it, and warranted a judgment of foreclosure. *Alexis v. Morrison* (Ill.), 117, and note, 120.
2. —.] Where the record book of a mortgage is burned, the index and file books furnish notice, to a subsequent purchaser, of the existence of the mortgage. *Id.*
3. *Foreclosure for installment.*] An action was brought to recover interest due and unpaid upon a contract in the nature of a mortgage, in which a judgment and decree of foreclosure was rendered, and the property sold. *Held*, that a second action, to foreclose and sell the property for the balance due on the contract, could not be maintained. *Poweshiek County v. Dennison* (Iowa), 521.
4. —.] Foreclosure for an installment due before the principal amount, and a sale of the property thereunder, exhausts the remedy of the creditor in this respect, and passes a clear and absolute title to the purchaser. *Id.*

*Of personal property, how affected by bankruptcy.]* See **BANKRUPTCY**, 52.

*When mortgages may look to insurers without exhausting remedy on mortgage.]*  
See **INSURANCE**, 271.

*When tender does not discharge lien of.]* See **TENDER**, 265.

#### MUNICIPAL CORPORATIONS.

1. *Actions to restrain illegal acts of. Parties.]* Owners of taxable property can maintain a suit to annul illegal acts of municipal officers when such acts will increase the municipal taxes, and the State is not a necessary party. *Newmeyer v. Missouri etc., R. R. Co. (Mo.)*, 394, and *note*, 400.
2. —.] Bill filed by tax payers of a county on behalf of themselves and all other tax payers, to set aside an order of the county court making a subscription on behalf of the county to the capital stock of a railroad, and to have the same declared null and void on the ground that it was illegal. *Held*, that there was no defect of parties. *Ib.*
3. *Power to compel repavement of streets.]* The power to grade and improve streets is a legislative power, and is a continuing one, unless specially restricted by the municipal charter. It may be exercised from time to time as the needs of the corporation may require, and of the necessity and expediency of its exercise the corporate authority and not the court is usually to judge. It follows that the power to compel property owners to pave streets adjoining their lots, or the power of paving at the property owners' expense, once exercised, is not exhausted; but such owners may be compelled to repave or to pay for repavement when required by municipal authorities. *McCormack v. Patchin (Mo.)*, 440, and *note*, 448.
4. *Street — duty of, to keep in repair — injury from defect in.]* Plaintiff was passing with due care along a street, which defendant was bound to keep in repair. In attempting to avoid the kick of a mule, she fell or jumped into an excavation upon the border of the street, and which, to the knowledge of defendant, rendered the street dangerous. *Held*, that the defendant was liable for the injury received. *Bassett v. City of St. Joseph (Mo.)*, 446.
5. *Defect in street — injury therefrom — contributory causes.]* A horse was injured while the driver was in the exercise of ordinary care and prudence — the injury being attributable to the insufficiency of defendant's street, conspiring with an accidental cause. *Held*, that defendant was liable in damages. *Hull v. City of Kansas (Mo.)*, 487.
6. *Liability for negligence of agent.]* The health officers of a city requested and directed plaintiff, a passer-by, to assist them in removing a coffin from the house, which he did. The coffin contained the body of a person who had died of the small-pox, which fact was known to the officers but was not communicated to plaintiff. Plaintiff caught the disease and communicated it to his children, who died thereof. *Held*, that plaintiff had no cause of action against the city. *Ogg v. City of Lansing (Iowa)*, 499.
7. *Liability for injuries occasioned by fire department.]* Plaintiff's property was destroyed by means of sparks thrown from a steam fire-engine belonging to a city, and engaged at the time in extinguishing a fire. The injury

was occasioned by the negligence of those in charge of the engine, who were employed and paid by the city. *Held*, that the city was not liable for the injury. *Hayes v. The City of Oshkosh* (Wis.), 760.

8. *Fire department — fires, losses by — liability.*] A grant, by the legislature to a city, of power to establish a fire department confers a legislative or discretionary power, and does not render the city liable, if the power is exercised, for losses occurring through fires. *Heller v. Sedalla* (Mo.), 444.

*Aid to railroads.*] *See* CONSTITUTIONAL LAW, 99.

*Power of, to tax lawyers.*] *See* TAXATION, 189.

*Regulation of bawdy-houses.*] *See* STATUTORY CONSTRUCTION, 471.

## MURDER.

*See* CRIMINAL LAW.

## NAVIGABLE RIVER.

*See* WATER AND WATER-COURSES, 701.

## NEGLIGENCE.

1. *Fire communicated by locomotive — proximate and remote cause.*] Through the negligence of defendant, a railroad company, sparks from a locomotive set fire to a warehouse. The wind was high, and the building of plaintiff's, two hundred feet from the warehouse, took fire there from, and was consumed. In an action to recover for the loss of plaintiff's building, *held*, that the question of proximate or remote cause was for the jury, to be determined under the instruction that the railroad company is to be held responsible, if the loss is a natural consequence of its alleged carelessness, which might have been foreseen by any reasonable person, but it is not to be held responsible for injuries which could not have been foreseen or expected as the results of its negligence or misconduct. *Hent v. Toledo, etc., Ry. Co.* (Ill.), 18.
2. *Fire kindled from locomotive, presumption — speculative damages.*] Where grass is set burning by the fire escaping from a locomotive, and the owner sues the company, negligence on the part of defendant will be presumed from the escape of the fire, and it devolves upon it, in order to rebut this presumption, to show that proper and safe locomotives and engines were used, and were conducted by the servants of the company in a proper and safe way. In such case the damages claimed would not be held too remote or speculative, although the property consumed was separated from the track by a strip of ground forty or fifty yards wide, where the plat was covered with dry grass and other combustible matter. *Clemens v. The Hannibal, etc., R. R. Co.* (Mo.), 460.
3. *Proximate and remote damage.*] Where doubt arises as to whether damages are proximate or remote, the issue should be presented to the jury by proper instructions. *Ib.*
4. *Projecting arm from car window.*] In an action against a railroad company by a passenger to recover for the negligent breaking of his arm, the evidence tended to show that at the time of the injury the plaintiff had his

arm outside the car window. *Held*, that this was not *per se* negligence in the plaintiff, but that whether it contributed to the injury was a question for the jury. *Barton v. St. Louis & Iron Mountain R. R. Co.* (Mo.), 418, and note, 428.

5. —.] A postmaster is not liable for the loss of a letter by the negligence of his clerk. *Keenan v. Southworth* (Mass.), 618.

*Liability of master to one servant for negligence of co-servant.*] See MASTER AND SERVANT, 32, 424, 598.

*Evidence of, where there is error in message.*] See TELEGRAPH, 38.

*Of assured.* See INSURANCE, 494.

*Liability of city for negligence of its agents.*] See MUNICIPAL CORPORATION, 499.

### NEGOTIABLE INSTRUMENTS.

1. *Failure of consideration.*] The consideration of a promissory note was the ice to be formed on certain ponds during the winter. *Held*, that it was no defense to an action on the note that no ice of any value was formed during the winter, and that whatever ice was formed was wholly worthless to defendant. *Townsend v. Board of Water Commissioners* (Ill.), 109.
2. *Alteration by filling up blanks.*] A negotiable promissory note for \$300 was altered to \$330 by filling up a blank left by the maker. *Held*, that the maker was liable to a *bona fide* holder for the amount of the note in its altered form. *Yocum v. Smith* (Ill.), 120.
3. *Promissory note — alteration of — recovery on original claim.*] The taking of a promissory note of a debtor does not extinguish the original debt or operate as payment, and, therefore, where the payee of a note has, without fraudulent intent, altered it after delivery, without the maker's consent, he may, nevertheless, recover upon the original demand. *Mattison v. Ellsworth* (Wis.), 766.
4. *Ratification of forged note.*] The name of H. was attached to a note as surety without his authority; but afterward it was shown to him and he admitted the signature to be his. *Held*, that he was estopped from denying the execution of the note. *Hefner v. Vandolah* (Ill.), 106, and note, 106.
5. *Promissory note — ratification of forgery — estoppel.*] In an action on a promissory note against a maker whose signature was forged it appeared that defendant had said to plaintiff that the note was "all right," and that if plaintiff would "hold on" he would pay him, thereby inducing plaintiff to omit to collect the note of the other maker, who afterward became insolvent and absconded. *Held*, that defendant was estopped from denying the execution of the note. *Hefner v. Dawson* (Ill.), 123.
6. *Accommodation note — diversion of.*] A *bona fide* holder for value of an accommodation note may recover the amount thereof from the accommodation indorser, notwithstanding the note has been diverted by the makers from the purposes for which it was indorsed. *Merchants' National Bank v. Comstock* (N. Y.), 168.
7. —.] Defendant indorsed a note for J. & G. for their accommodation, the agreement being that the note should be used only for the purpose of tak-

ing up a prior note indorsed by defendant. J. & G., who were the makers of the note, used it, contrary to the agreement, as collateral security for a loan previously made by H. to them. H. had the note discounted at plaintiff's bank, the officers of which had no notice of the agreement between defendant and J. & G. *Held*, that defendant was liable to plaintiff's bank on the note. *Id.*

8. *Defense to in hands of assignee.*] Actual or express notice to an assignee before maturity of a negotiable promissory note, of any infirmity or fraud in the execution or consideration, is not necessary to invalidate it in his hands; it will be sufficient that he have notice of circumstances that ought to put a prudent man on inquiry. *Hamilton v. Marks* (Mo.), 891, and note, 896.
9. *Promissory note — demand, where made — exhibition of note — notice to indorser, when not premature.*] In an action against the indorser of a promissory note payable without place named, *held*, (1) that a demand on the maker in the street was good, he having no place of business, and raising no objection to the demand; (2) that an actual exhibition of the note at the time of the demand was unnecessary, the holder having the note with him, and there being no request to produce it; and (3) that notice to the indorser upon the last day of grace, after demand upon the maker, was not premature. *King v. Crowell* (Mo.), 560.
10. *Sale of — stoppage in transitu.*] A vendor of negotiable paper has the right of stoppage in transitu, not only against the vendee, but also against a creditor of the vendee who has made a loan upon the promise of the vendee to transfer the paper to him on its arrival. *Muller v. Pender* (N. Y.), 259.
11. —.] Plaintiff, of Havana, on the order of S. & Co. of New York, drew bills on a London firm, and sold them for currency bills in New York, payable to R. S., a clerk of S. & Co. The bills were delivered to a vessel to be transported to New York, and deposited in the post-office. Plaintiff also telegraphed to S. & Co. what he had done, and S. & Co. procured a loan from P. on the faith of the telegram, and with the understanding that when the bills should arrive they would transfer them to P. as security. On the following day S. & Co. became insolvent, and plaintiff, having learned of this, commenced an action, through his agent in New York, to recover the bills on their arrival, and obtained an order enjoining S. & Co. from transferring or disposing of them. *Held*, that plaintiff had the right of stoppage in transitu, and that P. was not a *bona fide* holder of the bills, they never having been indorsed to him or come into his possession. *Id.*
12. *Bona fide holder.*] One having an equitable title only to negotiable paper is not a *bona fide* holder of it. *Id.*

#### NUISANCE.

*Pollution of water-courses by sewage of city.*] See WATER AND WATER-COURSES, 592.

*Pollution of water-course.*] See WATER AND WATER-COURSE, 658.

## OFFICE.

1. *Title to—burden of proof.*] A certificate of election to an office is only *prima facie* evidence of title; and if the returns are shown to be false, the incumbent must establish his title by other proof, or submit to judgment of ouster. *People ex rel. Judson v. Thacher* (N. Y.), 812.
2. —.] In an action in the nature of a *quo warranto* against the incumbent of an office, brought in the name of the people on the relation of a candidate for an office who, according to the returns, received less votes than the defendant, *Held*, (1) that the returns having been shown to be false, the burden was on the defendant to establish his title to the office by other proof than his certificate of election; (2) that on failure to do this, judgment of ouster should be rendered against defendant; but (3) that the relator was bound to show affirmatively that he was entitled to the office in order to obtain judgment to that effect. *Id.*

## PARDON.

*Effect of, on judgment for costs.*] A criminal, sentenced to fine and imprisonment and to the payment of costs, received a general pardon from the governor. *Held*, that he continued liable for the costs. *Estep v. Lacy* (Iowa), 498.

## PAROL EVIDENCE.

*Of contract within statute of frauds.*] See STATUTE OF FRAUDS, 618.

## PARTIES.

*In suits to annul illegal taxation.*] See MUNICIPAL CORPORATION, 294, and *note*, 400.

## PARTNERSHIP.

1. *Evidence of.*] In an action against A and B as partners, B denied that he was a partner of A. *Held*, that evidence that B held himself out as a partner was not admissible to prove the partnership. A partnership cannot be proved by general reputation. *Bowen v. Rutherford* (Ill.), 26.
2. *What constitutes—receiving part profits.*] A person who is to receive a part of the profits of a business, either in whole or part pay for his services, may maintain a bill in equity for an account of these profits. *Bentley v. Harris* (R. I.), 695.
3. *Action against representatives of deceased partner.*] An action will lie against the representatives of a deceased partner for the recovery of a partnership debt, after the recovery of a judgment therefor against the survivor, and the return of an execution thereon unsatisfied, notwithstanding it may be shown that the survivor had property out of which the execution might have been satisfied, which was not discovered by the sheriff. *Pope v. Cole* (N. Y.), 198.

## PASSENGER.

1. *Injury to person riding on freight train.*] Plaintiff was injured while riding upon a car attached to defendant's freight train. It appeared that defendant permitted passengers to be carried upon some of its freight trains, but not upon this one; that the plaintiff went aboard said train in



good faith, supposing that it was authorized to carry passengers, and was not informed to the contrary until after said accident; that the train was not brought to the passenger platform, and that the ticket office was not open. *Held*, that the jury might find that the plaintiff was a passenger and entitled to recover. *Lucas v. The Milwaukee & St. Paul R. R. Co.* (Wis.), 735.

*See* CARRIER.

# PASSENGER CARRIER.

*See* CARRIER

# PLEADING.

*Indorsement of insurance policy.*] The declaration on a policy of insurance set out in *hæc verba* a copy of the policy, which was payable to B, the insured, and on the back of which was the following: "Loss, if any, under this policy, is hereby made payable to Treasury Bank, of Chicago, as its interest may appear." Signed, "J. Farmer, secretary." There was no averment that the indorsement was made by the company, or that the insured requested it, or assented to it. *Held*, that the declaration failed to show a cause of action in the bank, and the defect was not cured by a verdict in its favor. *Commercial Insurance Company v. Treasury Bank* (Ill.), 78.

# POSTMASTER.

A postmaster is not liable for the loss of a letter occasioned by the negligence of his clerk. *Keenan v. Southworth* (Mass.), 613.

# PROBABLE CAUSE.

*See* MALICIOUS PROSECUTION, 75.

# PROMISE.

*Consideration.*] A consideration for a promise wrong from the promisee to a third person, but unknown to the promisor, is insufficient to support an action on the promise. *Ellis v. Clark* (Mass.), 609.

# PROMISSORY NOTE.

*See* NEGOTIABLE INSTRUMENTS.

# PROPERTY.

1. *In dead bodies.*] While a dead body is not property in the strict sense of the common law, it is a *quasi* property, over which the relatives of the deceased have rights which the courts will protect. *Pierce v. Proprietors of Swan Point Cemetery* (R. I.), 467.
2. —.] The persons having charge of a dead body hold it as a trust which a court of equity will regulate. *Ib.*
3. —.] The Roman, canon, and English ecclesiastical law, stated. *Ib.*

# PROXIMATE AND REMOTE CAUSE.

*See* NEGLIGENCE, 18, 460.

## RAILROAD.

1. *Ejectment against, wrongfully in possession of lands.*] A railroad company took land belonging to a private person without tendering compensation. *Held*, that the owner was not confined to the statutory remedy for the assessment of damages, but could maintain ejectment against the company. *Daniels v. The Chicago, etc., R. R. Co.* (Iowa), 490.
  2. *Indictment for causing death.*] A statute imposed a penalty upon railroads by whose negligence the life of a person is lost, to be recovered by indictment to the use of the heirs of the deceased. *Held*, that to bring a case within the statute death must be instantaneous. *State v. Grand Trunk Railway* (Me.), 553.
- Injury to person riding on freight train.*] See PASSENGER, 735.
- Municipal aid to.*] See CONSTITUTIONAL LAW, 99.

See CARRIER.

## RAPE.

1. *Evidence of unchastity of complainant.*] Upon the trial of an indictment for rape, evidence of the unchastity of the complainant is competent upon the question of consent. *Woods v. People* (N. Y.), 309, and note, 311.
2. —.] On a trial of W. for a rape upon M., *held*, that evidence was admissible to show that M. was in the habit of receiving men at her dwelling for promiscuous intercourse. *Id.*

## RATIFICATION.

*Of a forgery.*] See NEGOTIABLE INSTRUMENT, 106, 123.

## RESERVATION,

*In deed.*] See MINES.

## REVENUE STAMPS.

*On certificates of tax sales.*] Congress has no authority to impose a stamp duty on certificates of sale of lands for taxes, and where a stamp is placed upon such certificate and is included in the amount for which the land was sold, the sale is void. *Barden v. Supervisors of Columbia County* (Wis.), 763.

## RIPARIAN RIGHTS.

*Access to navigable stream.*] See WATER AND WATER-COURSES, 654.

## SALE.

1. *Of building to be removed by a day certain—failure to remove.*] Plaintiff bought of defendant and paid for a building to be removed by a day designated, but did not remove it within the time stated. *Held*, that the title to the building did not revert in the defendant. *Davis v. Emery* (Me.), 553.
2. *Implied warranty of articles sold for food.*] Upon the sale of a live cow by a farmer to retail butchers, there is no implied warranty that she is fit for food, although he knows that they buy her for the purpose of cutting her up into beef for immediate domestic use. *Howard v. Emerson* (Mass.), 603.

See VENDOR AND PURCHASER, 289.

## SEDUCTION.

1. *Relation of master and servant.*] In an action for seducing the plaintiff's daughter, it appeared that she was employed by a third person, but that the plaintiff required her to spend a part of every Sunday at home, and that while there she did work for him. *Held*, that she was his servant, so that he could maintain the action. *Kennedy v. Shea* (Mass.), 584.
2. —.] At the trial of an action for seducing the plaintiff's daughter, the admission of evidence that she worked for her father after the seduction furnishes the defendant no ground of exception, if the judge instructed the jury that the plaintiff could not recover unless the relation of master and servant existed between him and his daughter at the time of seduction. *Id.*
2. *Seduction by force.*] It is no objection to the maintenance of an action for seducing the plaintiff's daughter, that the sexual intercourse between the daughter and the defendant was had by force. *Id.*

## SHIP AND SHIPPING.

1. *Validity of lien laws.*] A State law creating a lien by attachment on vessels for supplies furnished in her home port, *held* valid. *Tug Boat Dorr v. Waldron* (Ill.), 86.
2. *Effect of release on bond.*] A tug was attached for supplies furnished in port, and was released on the giving of a bond. The attachment suit was discontinued, another suit commenced for the same cause, and the tug again seized. *Held*, that the seizure was valid, notwithstanding the bond given in the former suit. *Id.*

See INSURANCE, 98.

## STAMPS.

See REVENUE STAMPS.

## STATUTE.

- Omission of formal enacting clause.*] A State constitution provided that statutes should be preceded by the formal enacting clause, "Be it enacted," etc. *Held*, that the provision was directory merely, and that the omission of such clause did not invalidate a statute. *Cape Girardeau v. Riley* (Mo.), 437.

## STATUTE OF FRAUDS.

1. *Designation of official newspapers — minutes of municipal body — appropriation of money.*] The minutes of a resolution of the common council of a city designating an official newspaper and the signature of the clerk of the common council, at the end of the minutes, constitute a note or memorandum in writing signed by the party to be charged, within the meaning of the statute of frauds. *Argus Company v. Mayor of Albany* (N.Y.), 396.
2. —.] The common council of a city, on January 26, 1863, adopted a resolution that an official newspaper be designated for a term of three years, and that the chamberlain enter into a contract, with the newspaper to be designated, on terms and for prices which were expressed in the resolution.

This resolution was adopted by a vote of two-thirds of all the members taken by yeas and nays. The common council then designated plaintiff's newspaper, and the resolution and designation were entered in the minutes for the day, at the end of which the clerk signed his name. A contract in writing was then entered into between plaintiff and the chamberlain for the term of three years. On January 16, 1866, the common council resolved that plaintiff's newspaper be designated the official paper "in accordance with the former resolutions of the common council." This resolution was not adopted by a vote taken by yeas and nays, but it was entered in the minutes which were signed by the clerk. Plaintiff subscribed a written acceptance, but no contract was made with the chamberlain. *Held*, (1) that the contract made by the adoption of the resolution of January 16, 1866, was binding on the city, and was not void by the statute of frauds, the minutes of the common council satisfying the requirement that a contract not to be performed within a year shall be expressed by a note or memorandum in writing signed by the party to be charged; and (2) that the resolution of January 16, 1866, was not an appropriation of money for any purpose, requiring a two-thirds vote, taken by yeas and nays, as required by Laws of 1848, chap. 189, § 1, the purpose having been decided upon by the resolution of January 26, 1868. *Id.*

3. *Resulting trust.*] A resulting trust cannot be sustained by parol evidence, where no part of the purchase-money was paid by the person claiming to be the *cestui que trust*. *Burden v. Sheridan* (Iowa), 505.
4. *Effect of—parol evidence of contracts within—waiver of objection to.*] A contract within the statute of frauds is not illegal, but only not capable of being proved by parol, an immunity which may be waived by the one sought to be bound. *Montgomery v. Edwards* (Vt.), 618.
5. —.] On the trial of an action brought on a contract within the statute of frauds, parol evidence of the contract was given by the plaintiff, the defendant raising no objection until the testimony on both sides was in, and the argument to the jury had commenced. *Held*, that it was then too late to take the objection, and that it must be considered as waived. *Id.*

#### STATUTE OF LIMITATION.

*See* LIMITATION OF ACTION.

#### STATUTORY CONSTRUCTION.

*Municipal charter—Licensing of bawdy-houses.*] A statute made the keeping of a "bawdy-house or brothel" a misdemeanor. A municipal charter, subsequently granted, authorized the city council "by ordinance, not inconsistent with any law of the State, \* \* to regulate or suppress bawdy-houses." *Held*, that the charter operated as a repeal *pro tanto* of the statute, and that an ordinance licensing bawdy-houses was valid. *State v. Clarke* (Mo.), 471.

#### STOPPAGE IN TRANSITU.

*By tender of negotiable paper.*] *See* NEGOTIABLE INSTRUMENT, 269.

STREET.

*See* MUNICIPAL CORPORATION.

SUICIDE.

*Effect of, on insurance.] See* INSURANCE, 815.

SUNDAY.

*Advertisement in Sunday paper.] See* CONTRACT, 430.

SURETY.

*To non-negotiable paper — condition of signature.]* Defendant signed a non-negotiable promissory note as surety, upon the express condition that a certain other person should sign as co-surety. The signature of the latter was not obtained. *Held*, that defendant was not liable to a holder in good faith and without notice. *Ayers v. Milroy* (Mo.), 465.

*See* BOND, 60, 839.

TAXATION.

1. *Of lawyers — powers of municipal corporation.]* By the charter of a city, the city council was empowered to raise sums of money to defray the city expenses, by taxes in such manner as should be deemed expedient. By an ordinance of the council, lawyers were to be divided into classes, and the members of each class were to pay a specified tax. A committee was to make the classification, and public notice was to be given so that any lawyer dissatisfied with his classification might appear and correct it if erroneous. *Held*, that the ordinance was valid. A lawyer's license is taxable. *Ould & Carrington v. City of Richmond* (Va.), 189.
2. *Remedy for taxes illegally assessed and paid — election of remedies.]* Plaintiff's property was seized and sold to pay an assessment which was illegal, because of want of jurisdiction of the assessors. *Held*, that plaintiff had two remedies, either against the assessors in tort or against the town in assumpsit, for the proceeds of the property, but having elected the latter remedy and recovered judgment against the town, which was satisfied, he could not proceed against the assessors. *Ware v. Perotus* (Me.), 565.
3. *Collector justified by warrant.]* A collector of taxes, legally qualified, acting within the scope of his powers under a warrant from the assessors of his town, is protected against all illegalities but his own, even though the assessors had not in fact any jurisdiction over the person they assumed to tax. *Nowell v. Tripp* (Me.), 572.
4. —, *In an action of trespass against a tax collector for arrest and false imprisonment, the defendant justified under a warrant from the assessors of the town. Held*, a good defense, although the plaintiff was not liable to taxation by the assessors. *Ib.*
5. *Construction of term "public taxes."]* A township was granted to a college by a charter providing that the land in the township should be exempt from "public taxes." *Held*, that it was not exempt from taxation for municipal purposes. *Morgan v. Cress* (Vt.), 640.

*Illegal — parties to suit to annul.] See* MUNICIPAL CORPORATION, 894.

## TAXES.

*Trespass by collector of.] See* **TREMPASS**, 598.

## TELEGRAPH.

1. *Condition in message — evidence of negligence — measure of damage.] Plaintiff sent a message by defendant's telegraph. The message was written in a blank containing a printed condition that defendant would not be "responsible for any error or delay in the transmission \* \* of any unrepeatable message" without additional charges. The message directed the sale of 100 shares of stock. It was transmitted so as to direct the sale of 1,000 shares, and was not repeated. Held, that the condition in the message did not relieve the defendant from liability for errors arising from its own negligence; that the error was *prima facie* evidence of defendant's negligence; and that the measure of damages was the amount paid by plaintiff, by reason of an advance in price of stock, to replace the excess of 900 shares sold in obedience to the erroneous message. *Tyler v. Western Union Telegraph Company* (Ill.), 38, and *note*, 53.*
- 2 —.] A condition in a telegraph blank, upon which a message is written exempting the company from liability for unrepeatable messages is not a contract binding in law. *Id.*
3. *Conditions on message.] A condition upon a blank for a telegraph message relieving the company from liability for errors or delays in transmission or delivery, or for non-delivery of messages, will not relieve them from liability for a negligent omission to deliver a message written on such a blank. *Hubbard v. Western Union Telegraph Co.* (Wis.), 775.*
4. *Damages.] A message sent by plaintiff, but not delivered by defendant, directed plaintiff's agent to buy a certain quantity of wheat, to be delivered at any time in June at seller's option. The price of wheat fluctuated during the month of June, but was at the close of the month less than on the day when the message should have been delivered. Held, that the court could not presume that the plaintiff would have sold at the right time to make a profit, had the wheat been bought, and that he was, therefore, only entitled to nominal damages.*

## TENANT.

*See* **LANDLORD AND TENANT**.

## TENDER.

*Legal tender — governed by decisions of the courts existing when made.] A mortgage was executed before the passage of the legal tender act. After the decision of the United States Supreme Court (*Hopburn v. Griswold*, 8 Wall. 605) declaring that the act void as to contracts made prior to its passage, the grantee of the mortgagor tendered payment of the mortgage debt in legal tender notes, which the mortgagee refused. Subsequently the United States Supreme Court reversed its decision. *Know v. Lee*, 13 Wall. 457. *Held*, that the tender did not discharge the lien of the mortgagee, it being insufficient according to the law as then declared. *Harris v. Joe* (N. Y.), 285, and *note*, 288.*

**TESTAMENTARY CAPACITY.**

*See* WILL, 73.

**TITLE.**

*Of purchaser from fraudulent vendor.] See* VENDOR AND PURCHASER, 233.

**TORT.**

*See* COUNTER-CLAIM, 732.

**TRESPASS.**

1. *Liability for killing a dog.]* Defendant killed a dog which was on his premises but doing no damage. *Held*, that he was liable to the owner of the dog in an action of trespass. *Brent v. Kimball* (Ill.), 35.
2. *Distress for taxes — sale in excess of demand.]* A collector of taxes, having seized more chattels than sufficient to pay the tax and expense of sale, after selling enough for that purpose, proceeded further and sold all the balance of the distress consisting of distinct and separate articles. *Held*, that he was a trespasser only as to the goods in excess of the tax and expenses. *Seabins v. Goodale* (Me.), 568.

**TRUST.**

*Resulting.] See* AGENCY, 505; STATUTE OF FRAUDS, 505.

**USURY.**

1. *Contract when not usurious.]* A builder contracted to build houses for \$54,700, payable in annual installments, to bear interest at 7.80 per cent. The legal rate of interest was six per cent. *Held*, that if the interest was a part of the contract price of the houses, the contract was not usurious. *Grane v. Adams* (Va.), 130.
2. *Compound interest.]* The receiving of interest upon interest is not a violation of the statute of usury; and a note given for interest upon arrears of interest is valid. *Stewart v. Petree* (N. Y.), 353.

**USAGE.**

*Evidence of, to explain contract.] See* EVIDENCE, 234.

**VENDOR AND PURCHASER.**

*Right of purchaser from fraudulent vendor.]* Defendants purchased of J., and paid for, a quantity of linseed. At the time of the purchase J. did not have the linseed; but three days afterward he procured a quantity of plaintiffs, by fraudulent representations, and delivered it to defendants with the bill of lading. *Held*, that the plaintiffs could recover the linseed of defendants. *Bernard v. Campbell* (N. Y.), 260.

**VESSEL.**

*See* INSURANCE, 93; SHIP AND SHIPPING.

## WAIVER.

*Of condition in insurance policy.]* See INSURANCE, 8.

## WARRANTY.

*Implied, of articles sold for food.]* See SALE, 608.

## WATER AND WATER-COURSE.

1. *Pollution of.]* Every owner of land through which water flows is entitled to receive the water uncorrupted in quality from riparian proprietors above him, and a court of equity will issue an injunction to prevent such corruption, upon satisfactory proof thereof. *Richmond Manufacturing Co. v. Atlantic De Laine Co.* (R. I.), 658.
2. *Pollution by sewage.]* If the water of a stream becomes polluted by the emptying into it of city sewers, so that a riparian proprietor cannot use it in his business as he has been before accustomed to do, he cannot recover against the city for the pollution, so far as it is attributable to the plan of sewerage adopted by the city; but he can recover for it so far as it is attributable to the improper construction or unreasonable use of the sewers, or to the negligence or other fault of the city in the care or management of them. *Merrifield v. City of Worcester* (Mass.), 592.
3. *Navigable river—erection of wharf in.]* The erection of a wharf in tide-waters is not a nuisance, if the navigation is not injured by the erection. *Thornton v. Grant* (R. I.), 701.
4. *When will be enjoined.]* A court of equity will not interpose by injunction to prevent the erection of a wharf in such waters, unless it appears that the party petitioning will be materially and substantially injured by such erection. *Ib.*
5. *—.]* Defendants, being the owners of an estate upon a navigable river, were erecting a wharf against their estate, extending out into said river. At the suit of the complainants, who were the owners of the estate next below them on said river, a preliminary injunction had been issued restraining them from the completion of their wharf. Upon a motion to dissolve said injunction, *held*, the evidence showing that the injury to the complainants caused by the completion of said wharf would be slight and contingent, and that, on the other hand, the wharf would greatly promote the defendants' trade and business, that the injunction could not be maintained, except so far as to prevent the respondents from so constructing the wharf as to spread its materials into the water in front of the plaintiffs' estate. *Ib.*
6. *Riparian rights—access to navigable streams.]* A riparian owner of land bounded by navigable water has a right of access to such navigable water of which he cannot be lawfully deprived; and any one doing any thing in front of the land of such a riparian proprietor, which makes it less accessible, is liable in damages therefor. *Clark v. Peckham* (R. I.), 654.

*Percolating water.]* See EASEMENTS.

## WHARF.

*Erection of, in navigable river.]* See WATER AND WATER-COURSE.



## WILL.

1. *Testamentary capacity—presumption of law.*] W. was, by a stroke of paralysis, rendered unconscious and incapable of mental action. Four months afterward he made a will. *Held*, not a presumption of law that his unsoundness of mind continued until after the making of the will. *Irisht v. Newell* (Ill.), 79.
2. *Rule for determining testamentary capacity.*] The best form in which the question of testamentary capacity can be stated to the jury is, whether the testator's mind and memory were sufficiently sound to enable him to know and understand the business in which he was engaged at the time he executed the will; and in determining the question the competency of the mind should be judged of by the nature of the act to be done, from a consideration of all the circumstances of the case. Rules of testamentary capacity criticised. *Id.*
3. *Misdescription in—parol evidence to prove.*] Devise of the "west half of the north-east quarter of section 28," in T. township. *Held*, that parol evidence was inadmissible to show that testator owned the east half of the south-west quarter of section 28, and no other land, and that the draughtsman of the will had erred in putting the one description for the other, *Fitzpatrick v. Fitzpatrick* (Iowa), 533, and *note*, 549.
4. *Revocation—republishing, evidence of.*] A will was revoked by the subsequent birth of a child. *Held*, that republication could not be proved by parol evidence. *Carey v. Baughn* (Iowa), 534.
5. *Witness to.*] A wife is not a competent witness to her husband's will. *Pease v. Allen* (Mass.), 591.

## WORDS.

"Public uses."] *See* TAXATION, 649.

